DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-246
Vide 11-247
Title: Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Petitioner
v.
David Patchak, et al.
Docketed: August 25, 2011
Linked with 10A1224
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (09-5324)
Decision Date: January 21, 2011
Rehearing Denied: March 28, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 14 2011	Application (10A1224) to extend the time to file a petition for a writ of certiorari from June 26, 2011 to July 26, 2011, submitted to The Chief Justice.
Jun 15 2011	Application (10A1224) granted by The Chief Justice extending the time to file until July 26, 2011.
Jul 14 2011	Application (10A1224) to extend further the time to file a petition for a writ of certiorari from July 26, 2011 to August 25, 2011, submitted to The Chief Justice.
Jul 18 2011	Application (10A1224) granted by The Chief Justice extending the time to file until August 25, 2011.
Aug 25 2011	Petition for a writ of certiorari filed. (Response due September 26, 2011)
Sep 15 2011	Order extending time to file response to petition to and including October 26, 2011.
Sep 23 2011	Brief amici curiae of Wayland Township, Allegan County, et al. filed. VIDED.
Sep 26 2011	Brief amicus curiae of National Congress of American Indians filed. VIDED.
Oct 17 2011	Order further extending time to file response to petition to and including November 9, 2011.
Nov 9 2011	Brief of respondent David Patchak in opposition filed. VIDED.
Nov 21 2011	Reply of petitioner Match-E-Be-Nash-She-Wish Band of Pottawotomi Indians filed.
Nov 22 2011	DISTRIBUTED for Conference of December 9, 2011.
Dec 12 2011	Petition GRANTED The petition for a writ of certiorari in No. 11-247, Salazar v. Patchak, is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED
Jan 5 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including February 7, 2012. VIDED.
Jan 5 2012	The time to file respondents' brief on the merits is extended to and including March 20,

	2012. VIDED.
Feb 3 2012	SET FOR ARGUMENT ON Tuesday, April 24, 2012
Feb 7 2012	Brief of petitioners Ken L. Salazar, Secretary of the Interior, et al. filed. VIDED.
Feb 7 2012	Joint appendix filed. VIDED. (Statement of costs received.)
Feb 7 2012	Brief of petitioner Match-E-Be-Nash-She-Wish Band of Pottawotomi Indians filed. VIDED.
Feb 14 2012	Brief amici curiae of National Congress of American Indians, et al. filed. VIDED.
Feb 14 2012	Brief amici curiae of Wayland Township, et al. filed. VIDED.
Feb 14 2012	Record received from U.S.C.A. for D.C. Circuit. (1 envelope)
Feb 15 2012	The record from U.S.D.C. for the District of Columbia is electronic.
Mar 7 2012	CIRCULATED.
Mar 12 2012	Motion for divided argument filed by petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. VIDED.
Mar 20 2012	Brief of respondent David Patchak filed. VIDED. (Distributed)
Mar 27 2012	Brief amici curiae of 28 California Community Groups filed. VIDED. (Distributed)
Apr 2 2012	Motion for divided argument filed by petitioners GRANTED. VIDED.
Apr 17 2012	Reply of petitioner Match-E-Be-Nash-She-Wish Band of Pottawotomi Indians filed. VIDED. (Distributed)
Apr 17 2012	Reply of petitioners Ken L. Salazar, Secretary of the Interior, et al. filed. VIDED. (Distributed)
Apr 24 2012	Argued. For petitioners in No. 11-247: Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For petitioner in No. 11-246: Patricia A. Millett, Washington, D. C. For respondents: Matthew T. Nelson, Grand Rapids, Mich.
Jun 18 2012	Judgment is affirmed and case remanded Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Ginsburg, Breyer, and Alito, JJ., joined. Sotomayor, J., filed a dissenting opinion.
Jul 20 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

11-245

No. 11-

In The
Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Quiet Title Act and its reservation of the United States' sovereign immunity in suits involving "trust or restricted Indian lands" apply to all suits concerning land in which the United States "claims an interest," 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held.

II. Whether prudential standing to sue under federal law can be based on either (i) the plaintiff's ability to "police" an agency's compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

PARTIES TO THE PROCEEDING

Petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians intervened as a defendant in the district court and was an appellee in the court of appeals.

The respondent, David Patchak, was the plaintiff in the district court and the appellant in the court of appeals.

Dirk Kempthorne, Secretary of the United States Department of the Interior, and Carl J. Artman, Assistant Secretary of the Department of the Interior for the Bureau of Indian Affairs, were originally named as defendants in their official capacities in the district court. Secretary of the Interior Kenneth Lee Salazar has since been substituted for Mr. Kempthorne, and George Skibine, followed by Larry Echo Hawk, were substituted for Mr. Artman. *See* Fed. R. Civ. P. 25(d). Messrs. Salazar and Echo Hawk were appellees in the court of appeals.

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In The
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NO. 11-

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 632 F.3d 702. The decision of

the district court (App., *infra*, 25a-37a) is reported at 646 F. Supp. 2d 72.

JURISDICTION

The court of appeals entered its judgment on January 21, 2011. App., *infra*, 1a. The court denied both petitioner's and the United States' petitions for rehearing and rehearing en banc on March 28, 2011. App., *infra*, 38a-41a. On June 15, 2011, Chief Justice Roberts extended the time for filing a petition for writ of certiorari to and including July 26, 2011, and, on July 18, 2011, the Chief Justice further extended the time for filing the petition to and including August 25, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 42a-49a.

STATEMENT OF THE CASE

1. The Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, provides generally that the "United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Congress, however, expressly qualified that waiver of sovereign immunity, directing, *inter alia*, that "[t]his section does not apply to trust or restricted Indian lands." *Id.*

The Administrative Procedure Act ("APA") provides that the "United States may be named as a defendant" in an action "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity." 5 U.S.C. § 702. But that provision does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.*

The Indian Reorganization Act ("Reorganization Act" or "IRA") provides that the "Secretary of the Interior is authorized, in his discretion, to acquire * * * any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments, * * * for the purpose of providing land for Indians." 25 U.S.C. § 465.

2. Petitioner, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, commonly known as the "Gun Lake Tribe," is a federally recognized Indian tribe situated near Kalamazoo, Michigan. *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008) (per curiam). In 2001, petitioner, applied to the Secretary of the Interior to place a 147-acre parcel, known as the "Bradley Tract," into trust pursuant to the Reorganization Act, 25 U.S.C. § 465. Pet. C.A. Br. 7. The Bradley Tract consisted predominantly of an abandoned manufacturing facility, directly adjacent to a four-lane highway. *Id.* The land was zoned for light industrial and commercial use. *Id.* at 9.

Following a lengthy administrative review process, the Secretary announced his intention to place the land into trust following a 30-day waiting period to permit challenges to the decision to be made before the QTA barred suit. App., *infra*, 3a, 7a; *see* 25 C.F.R. § 151.12(b); 70 Fed. Reg. 25,596 (2005). Within that 30-day period, an organization called Michigan Gambling Opposition ("MichGO") sued the Secretary to prevent the trust acquisition as a violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h, and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, as well as an unconstitutional delegation of congressional power. *MichGO*, 525 F.3d at 26. MichGO's claims were rejected on the merits by both the district court and the court of appeals. *See id.* at 28-33; *Michigan Gambling Opposition v. Norton*, 477 F. Supp. 2d 1, 6-22 (D.D.C. 2007). After this Court denied MichGO's petition for a writ of certiorari, 129 S. Ct. 1002 (2009), the Secretary placed the land into trust, App., *infra*, 31a n.10. In April 2009, the Secretary approved, by operation of law, a gaming compact negotiated by the State of Michigan and petitioner. 74 Fed. Reg. 18,397-18,398 (2009).

On February 10, 2011, petitioner opened a gaming facility on a portion of the trust land that borders U.S. Highway 131. *MichGO*, 525 F.3d at 27. The business has since created more than 900 jobs and generated more than $2.5 million in revenue-sharing

funds for local schools and State and local governments.[1]

3. After MichGO lost its appeal, David Patchak filed suit against the Secretary of the Interior and the Assistant Secretary for the Bureau of Indian Affairs (collectively, "Secretary") under the APA challenging the Secretary's authority under the Reorganization Act to place the land into trust. He contended that petitioner was not a tribe under federal jurisdiction in 1934, and thus the Secretary lacked the authority to place the land into trust. Complaint at 7 ¶¶ 22-23. Patchak asserted as injuries that "he will be exposed to and injured by the negative effects of building and operating" a gaming facility, including changes in the alleged "rural character" of the area, "loss of aesthetic and environmental qualities," "increased property taxes," "weakening of the family atmosphere of the community," and "other aesthetic, socioeconomic, and environmental problems." *Id.* at 2 ¶¶ 6, 9. Patchak's complaint seeks, *inter alia*, an injunction "revers[ing] the decision to take the Property into trust" and divesting the United States of title. *Id.* at 9.

Petitioner intervened as a defendant in district court. App., *infra*, 4a. Petitioner and the Secretary then moved to dismiss for lack of prudential standing

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[1] *See, e.g.*, Ryan Lewis, *Wayland School, Township Win Big Casino Checks*, ALLEGAN COUNTY NEWS, July 27, 2011, http://www.allegannews.com/articles/2011/07/28/local_news/2.txt; Ursula Zerilli, *Gun Lake Casino Adds 200 Jobs to Payroll*, THE GRAND RAPIDS PRESS, March 22, 2011, http://www.mlive.com/business/west-michigan/index.ssf/2011/03/gun_lake_casino_adds_200_jobs.html.

on the ground that the interests Patchak asserted were not within the zone of interests protected by the Reorganization Act. App., *infra*, 30a. They also moved to dismiss the suit as barred by sovereign immunity under the QTA's "trust or restricted Indian lands" provision, 28 U.S.C. § 2409a(a).

The district court dismissed the complaint on prudential standing grounds. App., *infra*, 25a-36a. The court held that Patchak's "alleged injuries could not be further divorced from" the Reorganization Act's purposes of "tribal self-determination, self-government, and self-sufficiency." *Id.* at 34a. With respect to Patchak's "interest in ensuring that only qualified tribes receive benefits under the IRA," the court explained that "such an interest, if true, is indistinguishable from the general interest every citizen or taxpayer has in the government complying with the law." *Id* at 34a. "To find that plaintiff has prudential standing on this basis alone," the court concluded, "would make a mockery of the prudential standing doctrine altogether." *Id.* The court also held that Patchak's allegations of injuries arising from gaming "cannot save plaintiff's case" because there is "no evidence indicat[ing] that the IRA focuses on or otherwise seeks to protect the interests of the surrounding community or the environment." App., *infra*, 35a n.11.

Finally, the district court noted that its "continuing subject matter jurisdiction * * * [was] also seriously in doubt" under the QTA. *Id.* at 36a n.12.

4. The court of appeals reversed. App., *infra*, 1a-24a. The court first held that Patchak had prudential standing. The court acknowledged that Patchak was not an intended beneficiary of the Reorganization Act, like a tribe, *id.* at 10a-11a, but held that prudential standing devolves "not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects," *id.* at 6a. The court also ruled that, although the suit challenged only the Secretary's trust decision, the prudential standing inquiry "must be evaluated in light of the intended use of the property" and the protections that a different statute, the Indian Gaming Regulatory Act, might provide for Patchak's asserted environmental and aesthetic injuries. The court then ruled that, because Patchak's injuries are "cognizable" and allegedly protected by another statute, he had prudential standing to sue under the Reorganization Act.

With respect to the QTA, the court of appeals held that the "trust or restricted Indian lands" exception does not bar the suit because, in the court's view, that exception applies only when "the plaintiff is claiming an interest in real property contrary to the government's claim of interest." App., *infra*, 18a. In so holding, the court "acknowledge[d]" the contrary "views of the Ninth, Tenth and Eleventh Circuits," but stated that it did not find those courts' rulings "convincing." *Id.* at 20a (citing *Florida Department of Business Regulation v. Department of Interior*, 768 F.2d 1248, 1253-1255 (11th Cir. 1985); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-963 (10th Cir. 2004); and *Metropolitan Water Dist. of S.*

Cal. v. United States, 830 F.2d 139, 143-144 (9th Cir. 1987)).

The court of appeals subsequently denied both petitioner's and the federal government's petitions for rehearing and rehearing en banc. App., *infra*, 38a-41a.

REASONS FOR GRANTING THE WRIT

In announced conflict with three other federal circuits (and unacknowledged conflict with a fourth circuit), the D.C. Circuit's decision has opened a substantial gap in the federal government's sovereign immunity from litigation challenging its title to trust or restricted Indian lands, as well as the Quiet Title Act's application to federal lands generally. Because of the D.C. Circuit's virtually universal jurisdiction over suits against the federal government, moreover, prospective plaintiffs will now be able to forum shop their way around the United States' sovereign immunity in disputes challenging the federal government's title to land, absent this Court's review.

The court of appeals' prudential standing decision compounds the need for review. The D.C. Circuit's ruling broadly expands the prudential standing doctrine by extending standing to any individual judicially deemed appropriate to "police" agency compliance with the law, even though the interests the plaintiff asserts are neither protected nor remediated by the statute the plaintiff seeks to enforce. In so ruling, the D.C. Circuit has taken its prudential standing law into conflict with the law of numerous other circuits.

Given the fundamental importance of the D.C. Circuit's decision denying the United States an immunity from suit that it enjoys in four other circuits; the court's broad expansion of the prudential standing doctrine in APA cases (the majority of which arise in the D.C. Circuit); and the exceptional disruption the decision causes to the affected Indian tribes, local governments, and businesses that rely critically on stability in the status of federal lands, there is a pressing need for this Court's review.

I. THE D.C. CIRCUIT'S DECISION CREATES AN ACKNOWLEDGED CIRCUIT CONFLICT ON THE SCOPE OF THE UNITED STATES' IMMUNITY FROM SUIT UNDER THE QUIET TITLE ACT

A. The Decision Admittedly Creates A Circuit Conflict

The Quiet Title Act expressly and unqualifiedly preserves the United States' sovereign immunity from suits involving "trust or restricted Indian lands" "in which the United States claims an interest." 28 U.S.C. § 2409a(a). The court of appeals nevertheless held that the statute does not mean what it says and that, instead, Congress's reservation of the United States' immunity should be further narrowed to apply only if the plaintiff is him- or herself asserting title to the land at issue. Because Patchak claims no title to the reservation lands at issue, the court held that the QTA did not "expressly" or even "impliedly forbid[] the relief which is sought," 5 U.S.C. § 702, and thus the lawsuit could proceed.

As the D.C. Circuit recognized, App., *infra*, 20a, its cramped reading of the scope of sovereign immunity protected by the QTA squarely conflicts with the rulings of numerous other circuits in factually indistinguishable cases.

In *Florida Department of Business Regulation v. United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), the Secretary of the Interior placed land into trust for a tribe, *id.* at 1250. The plaintiffs subsequently brought suit under the APA seeking to reverse the decision to place the land in trust. *Id.* at 1251, 1253. The plaintiffs argued, as Patchak did here, that the QTA did not apply because they did "not seek to have title to the land quieted in them, nor d[id] they seek recognition of any property interest in the land." *Id.* at 1254.

Unlike the D.C. Circuit, however, the Eleventh Circuit rejected that argument, finding it dispositive that the relief sought in the case would "divest the United States of its title to the land." 768 F.2d at 1251. Because "[c]learly[] this relief would operate against the sovereign," the Eleventh Circuit ruled that the claim was barred. *Id.* "Congress sought" in the QTA, the Eleventh Circuit stressed, "to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes," and the plaintiffs' lack of a direct property interest in the land "d[id] not lessen the interference with the trust relationship a divestiture would cause." *Id.* at 1254.

The Eleventh Circuit further noted that the QTA plainly barred suit by anyone claiming legal title to

trust or restricted lands, and thus "[i]t would be anomalous to allow others" with lesser legal interests to bring suit where titleholders could not. 768 F.2d at 1254-1255. Accordingly, the court of appeals held that "Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids" relief under the APA that seeks "an order divesting the United States of its title to land held for the benefit of an Indian tribe." *Id.* at 1254.

That holding is flatly irreconcilable with the D.C. Circuit's decision in this case. The very distinction in the nature of the plaintiffs' interest—the absence of a title claim—that the Eleventh Circuit found legally insufficient to overcome immunity in *Florida Department*, 768 F.2d at 1254, was held by the D.C. Circuit to be legally dispositive in waiving immunity and allowing Patchak's suit to go forward. And the anomaly that influenced the Eleventh Circuit's decision, 768 F.2d at 1254-1255—reading the QTA to allow suits by plaintiffs with no direct interest in the land, while debarring suits by those with direct claims to title—did not trouble the D.C. Circuit, App., *infra*, 21a-23a.

The Tenth Circuit followed the Eleventh Circuit's lead in *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004). Just like Patchak, the plaintiff in *Neighbors* sought to overturn the Secretary's decision to place land into trust so that the tribe could develop land that had been lying idle for commercial purposes. *Id.* at 959-960. As here, the plaintiff contended that the QTA did not apply because the plaintiff did not "claim any ownership interest in the property," and thus the suit

was not the "equivalent of a quiet title action." *Id.* at 961.

The Tenth Circuit disagreed, following the Eleventh Circuit and concluding that "the Indian trust land exemption applie[d] with equal force" even though the plaintiff was "not seeking to gain title" to the land. 379 F.3d at 962. The court emphasized that the APA bars suit where another statute "expressly or impliedly forbids the relief which is sought," and thus courts "must focus on the relief [a plaintiff] requests." *Id.* at 961. Because the suit "challenge[d] the United States' title to trust land," and sought relief declaring the United States' title "null and void," the court concluded that the lawsuit was "expressly or impliedly" forbidden by the QTA. *Id.* at 961-962.

The Tenth Circuit has repeatedly reaffirmed that position. *See Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974-978 (10th Cir. 2005); *Governor of Kansas v. Kempthorne*, 516 F.3d 833, 842-843 (10th Cir. 2008); *Iowa Tribe of Kansas & Neb. v. Sac & Fox Nation of Mo.*, 607 F.3d 1225, 1230-1231 (10th Cir. 2010).

The Ninth Circuit also has foreclosed suits just like Patchak's. In *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd by equally divided Court, sub nom. California v. United States*, 490 U.S. 920 (1989), the court of appeals flatly rejected the argument that "the QTA does not apply" to an APA challenge to an Indian trust-lands decision just "because [the plaintiff] is not seeking to quiet title in itself," *id.* at

143. "Indian lands" immunity applies, the court explained, because the "effect of a successful challenge would be to quiet title in others than the Tribe," and "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them." *Id.* at 143-144; *accord Robinson v. United States*, 586 F.3d 683, 687-688 (9th Cir. 2009) ("[A] suit that actually challenges the federal government's title, however denominated, falls within the scope of the QTA regardless of the remedy sought."); *Alaska v. Babbitt*, 38 F.3d 1068, 1073 (9th Cir. 1994) ("[W]hen the United States has an interest in the disputed property, the waiver of sovereign immunity must be found, if at all, within the QTA.").

Finally, although not acknowledged by the D.C. Circuit, its decision cannot be reconciled with the law of the Seventh Circuit. That court specifically held in *Shawnee Trail Conservancy v. United States Department of Agriculture*, 222 F.3d 383 (7th Cir. 2000), that the QTA continues to apply even "in the context of claims that do not seek to quiet title in the party bringing the action," *id.* at 388. Underscoring the sweeping implications of the D.C. Circuit's decision in this case, *Shawnee Trail* involved a challenge to the United States' ownership of national forest lands, not trust or restricted Indian lands. Because the plaintiffs challenged the legitimacy of the United States' title, and thus impliedly argued that title belonged in a third party, the Seventh Circuit ruled that the claim was subject to the QTA and excluded from the APA's waiver of immunity. *Id.* at 387-388. Indeed, the court concluded that "'[i]t

would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme [in the QTA] to be circumvented by artful pleading'" about the nature of the plaintiff's interest. *Id.* at 388 (quoting *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 285 (1983)).

Thus, the law, holdings, and analyses in the Seventh, Ninth, Tenth, and Eleventh Circuits are diametrically opposed to that of the D.C. Circuit in this case. As a result, Patchak's case would have been dismissed and the United States' sovereign immunity preserved had this case arisen in any of those four circuits. The scope of the federal government's immunity from suit under the APA and the QTA, however, is an important and recurring question with substantial impact on the Indian tribes and the local governments and businesses that are affected by such litigation. It should not vary based on circuit borders.

The Seventh Circuit's decision in *Shawnee*, moreover, underscores that the impact of the D.C. Circuit's decision is not confined to disputes over Indian trust lands. The decision is a fundamental reconfiguration of the Quiet Title Act's operation with respect to any suit involving title to lands in which the United States "claims an interest," whether public lands, Indian lands, easements, or any other lands covered by the QTA's terms and its exceptions. 28 U.S.C. § 2409a(a). Approximately 99% of all public lands administered by the Bureau of Land Management fall within the geographical confines of the Seventh, Ninth, Tenth, and Eleventh Circuits.

See U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 13 (Table 1.4) (2010 ed.) ("Public Lands Under Exclusive Jurisdiction of the Bureau of Land Management, Fiscal Year 2010"). But the protections that those circuits have afforded the United States by requiring lawsuits involving those lands to proceed on the QTA's terms have now been erased, since plaintiffs within those jurisdictions can avoid the QTA and controlling circuit law altogether simply by filing their lawsuits in the District of Columbia. The resolution of questions pertaining to the United States' sovereign immunity in that broad category of cases should not vary based on circuit geography or where the plaintiff chooses to file suit.

The split, moreover, is entrenched. The D.C. Circuit refused to rehear the case en banc notwithstanding its acknowledged departure from the law of other circuits. Given the D.C. Circuit's virtually universal jurisdiction over APA actions, that circuit's rejection of sovereign immunity will likely become the *de facto* law of the land, leaving no realistic opportunity for further consideration of this issue or development in the law of the circuits.

B. The D.C. Circuit's Decision Is Wrong And Contrary To This Court's Precedent

The D.C. Circuit's decision further merits review because it is incorrect and contrary to this Court's consistent enforcement of the Quiet Title Act and its intersection with the APA. In *Block*, *supra*, North Dakota sought to quiet title to a riverbed on federal land over which the United States claimed

ownership, 461 U.S. at 277-278. North Dakota argued that it could avoid the QTA's statute of limitations because it was not bringing a traditional quiet title action, but instead was bringing an "officer's suit" alleging that "the federal officials charged with supervision of the disputed area" were unlawfully "interfering with the claimant's property rights." *Id.* at 281.

This Court ruled that the QTA's limitations on the federal government's waiver of sovereign immunity could not be avoided just by filing a case that did not fit the traditional quiet-title-suit model. "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property," 461 U.S. at 286, the Court explained, and thus the critical inquiry is whether the *United States*' title, not the plaintiff's title, is at issue in the suit. This Court further held that North Dakota's reliance on the APA's waiver of sovereign immunity failed because the QTA is an "other statute" that "forbids" relief when an action disputing the United States' title to land is brought after expiration of the limitations period. *Id.* at 286 n.22 (quoting 5 U.S.C. § 702).

In *United States v. Mottaz*, 476 U.S. 834 (1986), this Court extended *Block*'s reading of the QTA's waiver of sovereign immunity to the "Indian lands" exception. Reaffirming *Block*'s focus on whether the litigation challenges the United States' title to land, this Court explained that the exception "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *Id.* at 842. "Thus,

when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity," leaving it intact. *Id.* at 843.

The D.C. Circuit's opinion has now resurrected the emphasis on the quiet-title-like form of the lawsuit that this Court rejected in *Block*, and has made the plaintiff's claim of title, not the question of the United States' title, an indispensable precondition to preserving sovereign immunity, contrary to both *Block* and *Mottaz*.

There is a reason, moreover, that four other circuits have come to the opposite conclusion from the D.C. Circuit. The plain text of the statute forecloses the D.C. Circuit's reading. To begin with, the Act's waiver of sovereign immunity must be construed narrowly. *See Block*, 461 U.S. at 287 (the QTA's "conditions must be strictly observed and exceptions thereto are not to be lightly implied").

Further, nothing in the operative statutory text conditions either the waiver of immunity or the statute's express reservation of sovereign immunity on whether the plaintiff files a formal quiet title suit. To the contrary, the Act applies to any "civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Thus, the requirement is that there be "a" disputed title. But the title under dispute can be that of the United States, the plaintiff, or both. There is no textual requirement making the nature of the plaintiff's claim dispositive of

immunity. And the exception, which unqualifiedly preserves full sovereign immunity for any case involving "trust or restricted Indian lands," necessarily shares that same scope.

The D.C. Circuit's decision also failed to give effect to the APA's express limitation on its own waiver of sovereign immunity. Section 702 preserves sovereign immunity for any claim where "any other statute" "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Because the QTA expressly preserves the United States' sovereign immunity in civil actions disputing the federal government's title to trust or restricted Indian lands, that statute both expressly and impliedly forbids lawsuits seeking to divest the United States of its title.

After all, Congress enacted the QTA and its reservations of immunity "against the backdrop of sovereign immunity," with the understanding that "the statutory remedies" prescribed in that Act, including its limitations, would "be [the] exclusive" mechanism for adjudicating title to land in which the United States claims an interest. H.R. REP. NO. 1656, 94th Cong., 2d Sess. 27-28 (1976) (quoting letter from (then) Assistant Attorney General Antonin Scalia to the Senate). It is precisely because Congress would not have seen the need to include express retentions of immunity in preexisting statutes that the Justice Department requested, and Congress agreed, to add the "expressly or impliedly" limitation on the APA's own waiver of immunity. *See id.* That limitation ensured that prior "specific determinations" that immunity should be retained, like that in the QTA's Indian-lands exception, would

not be waived by Section 702's "general provision." *Id* at 28.

The D.C. Circuit's decision, however, empties Section 702's limitation of its intended force. Prior to the APA's enactment, the QTA fully preserved the United States' immunity from any civil suit challenging title to trust or restricted Indian lands. The whole purpose of the APA limitation was to leave such calibrated reservations of sovereign immunity intact.

The court of appeals' decision not only unravels that protection, but also creates an anomalous statutory scheme under which "a plaintiff claiming title to land [cannot] challenge the United States' title," while "a plaintiff with no claimed property rights" at all can hale the United States into court. *Neighbors*, 379 F.3d at 962. It is "highly unlikely" that Congress would have legislated such an upside-down prioritization of the right to bring suit under the QTA or the APA. *Id.*

C. This Court's Prompt Review Is Needed

This substantial split of authority requires the Court's immediate attention because it involves the United States' sovereign immunity from suit in the broad class of cases subject to the Quiet Title Act. This Court has a longstanding practice of resolving sovereign immunity questions at the outset of litigation. Indeed, the Court has twice granted certiorari in cases dealing with the United States' interests in land in precisely the same procedural posture.

In *Malone v. Bowdoin*, 369 U.S. 643 (1962), the plaintiffs sued to eject a federal official from disputed land. As here, the district court granted the defendant's motion to dismiss on sovereign immunity grounds, but the appeals court reversed and reinstated the lawsuit. *Id.* at 644-645. This Court promptly "granted certiorari to consider the scope of sovereign immunity in suits of this kind." *Id.* at 645. Similarly, in *Mottaz*, after the appeals court rejected the government's threshold claim of sovereign immunity, this Court "granted certiorari to consider whether respondent's claim was barred under * * * the limitations provision governing Quiet Title Act claims." 476 U.S. at 840-841.

More generally, the Court has repeatedly granted review at the early stages of litigation to resolve questions of sovereign immunity, whether to spare the dignity of a sovereign, *see, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-147 (1993) (state sovereign immunity); *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2188-2189 (2009) (foreign sovereign immunity); or to protect government officials from potentially disruptive and unnecessary litigation, *see, e.g.*, *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 265-266 (1997) (reviewing interlocutory decision allowing quiet title claim to land to proceed under *Ex parte Young*, 209 U.S. 123 (1908)).

Given the D.C. Circuit's sweeping jurisdiction over suits against the federal government and the large number of cases arising each year concerning the United States' interests in Indian trust and restricted lands, as well in public lands like those in

Shawnee, the sovereign immunity principles at stake here equally merit prompt review. Indeed, whether the law of the D.C. Circuit is right or wrong, suits in the D.C., Seventh, Ninth, Tenth, and Eleventh Circuits should proceed on even-handed terms and the rule of sovereign immunity should be the same.

These types of claims, moreover, present an even stronger case for interlocutory review. Congress enacted the Indian lands exception to prevent third-party litigation from impairing the government's "solemn obligations" to Indian tribes, many of which are protected by treaty. H.R. REP. NO. 1559, 92d Cong., 2d Sess. 13 (1972) (letter from Mitchell Melich, Solicitor for the Dep't of the Interior). In so doing, Congress sought to avoid the exceptional disruption that post hoc litigation divesting the United States' title to land would cause not just to the tribes, but also to state and local governments and communities that have arranged their political and economic relationships in reliance on the federal government's title to and control over the land. *See* fn. 1, *supra*. Because court rulings calling the United States' title into question have sweeping consequences for multiple inter-governmental relationships and impose practical hardships on affected communities, the sovereign immunity question presented here has distinctively far-reaching public consequences that warrant this Court's immediate review.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THE PRUDENTIAL STANDING LAW OF OTHER CIRCUITS AND OF THIS COURT

Before denying the United States' sovereign immunity from suit, the D.C. Circuit ruled that Patchak has prudential standing because his alleged interests positioned him to "police" the Secretary's compliance with the law and because he asserted injuries cognizable under a different federal law that he is *not* suing to enforce. That holding contradicts the law of multiple circuits in two respects, and fundamentally undermines prudential standing principles laid down by this Court.

In addition to the constitutional requirements for standing under Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Central to those prudential principles is the requirement "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated *by the statutory provision * * * invoked in the suit*." *Bennett*, 520 U.S. at 162 (emphasis added). The prudential-standing analysis thus focuses on the plaintiff's interests under the "particular provision of law upon which the plaintiff relies," not the "overall purpose" of legislation. *Id.* at 175-176. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) ("the plaintiff's interests" must be "among" the "interests arguably * * * to be protected by the statutory provision at issue"). Inversely, prudential standing is not recognized if a

plaintiff's interests in the suit are "inconsistent with the purposes implicit in the statute." *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 870 (2011). The D.C. Circuit's decision runs afoul of that limitation.

A. The D.C. Circuit's Conferral Of Prudential Standing Based On The Plaintiff's Interest In "Polic[ing]" Agency Compliance Is Contrary To The Law Of Other Circuits And Of This Court

As this Court has repeatedly recognized, "[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. REP. NO. 1804, 73d Cong., 2d Sess. 6 (1934)); *accord New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983). "'The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition.'" *Mescalero Apache*, 411 U.S. at 152 (quoting 78 Cong. Rec. 11,732 (June 15, 1934) (Rep. Howard)); *see Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 387 (1976) (Reorganization Act is "specifically intended to encourage Indian tribes to revitalize their self-government").

The authority of the United States to place land into trust for tribes under the Reorganization Act

promotes those goals by protecting land against alienation and according the land a federally protected status that provides a more stable footing for economic and political development. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][a]–[b] (2005 ed.). Because those trust decisions can have an impact on the regulatory authority of state and local governments, however, regulations permit those "affected * * * [by] any administrative determination to take land into trust" to file suit within 30 days of the Secretary's trust determination. 61 Fed. Reg. 18082; *see* 25 C.F.R. §151.12(b).

Patchak did not file suit within 30 days, and his complaint alleges neither that the decision to place the land into trust under the Reorganization Act itself has caused him any injury, nor that he has any individual stake in the goals of tribal development or self-government that the Act's land-into-trust process promotes. His concerns with the aesthetic and environmental impact of gaming, Complaint at 3 ¶ 9, are unhinged from the Reorganization Act's trust process because the Secretary's decision to place land into trust does not turn on any particular use of the land (gaming or otherwise). *See* 25 U.S.C. § 465 ("The Secretary of the Interior is authorized, in his discretion, to acquire * * * any interest in lands * * * for the purpose of providing land for Indians.").

Indeed, the overwhelming majority of land held in trust by the United States under the IRA is used for non-gaming tribal, governmental, and developmental purposes. Here, while Patchak seeks to take the entire 147-acre tract out of trust, only roughly a

quarter of that land (27%) is used for the gaming facility. Admin. Rec. 000027. The vast majority of the land serves additional tribal development goals.

Patchak's alleged injuries thus arise not from the Secretary's land-into-trust decision under the Reorganization Act, but from separate decisions by the Department of Interior and the National Indian Gaming Commission to authorize gaming on the land and to approve Michigan's gaming compact with petitioner. But those decisions were made pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, and state law, not the Reorganization Act. Patchak, however, never filed suit under those laws to challenge the Commission's approval of the gaming ordinance, Michigan's adoption of the Compact, or the Secretary's approval of the Compact.[2]

Nor does Patchak represent a state or local regulatory authority whose governmental interests have been affected by the trust decision. To the contrary, many local governmental agencies and businesses have supported the trust decision, and the State of Michigan entered into a gaming compact with petitioner.[3]

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[2] It was MichGO that unsuccessfully claimed that the Secretary's decision violated the Indian Gaming Regulatory Act. *See MichGO*, 525 F.3d at 28-33.

[3] *See* Pet. C.A. Br. 9-10; Joint Amicus Curiae Brief of Wayland Twp., Deputy Sheriff's Ass'n of Mich., Barry Cty. Chamber of Commerce, and Friends of the Gun Lake Indians, *MichGO* (D.D.C.), *supra*, 2006 WL 644928; *accord* Motion of the

The D.C. Circuit nevertheless conferred prudential standing on Patchak on the ground that his opposition to gaming motivated him "to police the interests that the [Reorganization Act] protects." App., *infra*, 6a. That expansive conception of prudential standing effectively licenses all "concerned bystanders" with a claimed Article III injury to "vindicate [their] value interests," *Diamond v. Charles*, 476 U.S. 54, 62, 66 (1986), no matter how disconnected their claimed injuries are from the statute under which they are suing, in direct contradiction to the prudential standing law of four other circuits and this Court.

1. The Decision Conflicts with the Law of the Fifth, Sixth, Seventh and Eighth Circuits.

In *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), the Eighth Circuit rejected a prudential standing claim virtually identical to Patchak's. A private business (Sun Prairie) filed suit under the APA to nullify the Secretary of Interior's decision to void a lease agreement with an Indian tribe. *Id.* at 1035. Sun Prairie had been slated to operate a production facility for the tribe under that lease, and had lost $5 million as a result of the Secretary's action. *Id.* at 1034-1035. Sun Prairie

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Kalamazoo Regional Chamber of Commerce for Leave to Join Wayland Twp., *et al.*, Motion for Leave to File an Amicus Curiae Brief, *MichGO* (D.D.C.), *supra* (adopting arguments in Wayland Township amicus brief); Motion for Leave to Join Wayland Twp.'s, *et al.* Motion for Leave to File an Amicus Curiae Brief, *MichGO*, (D.D.C.), *supra* (same motion by Allegan Chamber of Commerce).

asserted standing based on "statutes involving the relationship between Indian tribes and the federal government," including 25 U.S.C. § 81 and § 415, which regulate contracts and leases involving Indian lands. *Rosebud Sioux*, 286 F.3d at 1036. However, those statutes, like the Reorganization Act's land-into-trust provision, "are intended to protect only Native American interests." *Id.* at 1036-1037. The Eighth Circuit accordingly held that Sun Prairie's "asserted interests, while considerable, are not arguably within the zone of interests to be protected or regulated" by the statutes on which the plaintiff relied, and indeed the plaintiff's interests "conflict with the tribes' interests." *Id.* at 1037.

Sun Prairie's injuries as a third-party beneficiary of the lease at issue certainly gave it as much motivation and interest to "police" the Secretary's compliance with the law, App., *infra*, 6a, as Patchak claims, and thus would have sustained prudential standing under the D.C. Circuit's legal standard. The different outcome in the two circuits is explainable only by the fact that the Eighth Circuit's prudential standing law, unlike that of the D.C. Circuit, requires that the plaintiff's interest be consistent with, or at least not "inconsistent with the purposes implicit in the statute" being enforced. *Thompson*, 131 S. Ct. at 870.

Likewise, the Sixth Circuit has twice dismissed claims for lack of prudential standing where the plaintiffs' interests were not consistent with the purposes of the statute under which suit was brought. In *Courtney v. Smith*, 297 F.3d 455 (6th Cir. 2002), the Sixth Circuit held that federal employees

lacked prudential standing under federal procurement statutes to bring an APA suit challenging the private outsourcing of work that, up to that point, had been done on military bases by the plaintiffs, *id.* at 463-464. The court in *Courtney* reasoned that the procurement statutes were designed to maximize cost-effective procurement by private industry, while the plaintiffs' asserted interests were in maximizing their work as government employees. *Id.*

In so ruling, the Sixth Circuit rejected the exact theory of prudential standing embraced by the D.C. Circuit here. The court held that the employees' interest in "ensuring that the government conforms to the applicable laws in making outsourcing decisions" did not support prudential standing because that interest in policing agency compliance with the law is a "generalized grievance, which presumably would be shared by all citizens." *Courtney*, 297 F.3d at 461; *see Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 742 (6th Cir. 1997) (employer lacked prudential standing to withdraw its employee's black lung benefits claim because the withdrawal statute protected "the best interests of the claimant" and the plaintiff's "interests are at odds with the concerns of the provision in issue").

The Seventh Circuit's decision in *American Federation of Government Employees v. Cohen*, 171 F.3d 460 (7th Cir. 1999), analyzed the same government-employee claim at issue in *Courtney* and likewise held that the plaintiffs lacked prudential standing because "the interests of federal employment, and the goal of private procurement are

inconsistent," *id.* at 471. And again, in contrast to the D.C. Circuit's focus on whether the plaintiff "can be expected to police" compliance with the law, App., *infra*, 6a, the Seventh Circuit flatly rejected the plaintiffs' claim that "their interest in a realistic and fair contracting process" supported prudential standing, *id.* at 470.

Finally, in *Bonds v. Tandy*, 457 F.3d 409 (5th Cir. 2006), the Fifth Circuit ruled that a plaintiff lacked prudential standing to challenge the Drug Enforcement Agency's refusal to allow his employment as a pharmacist because of a prior controlled substance conviction, *id.* at 411. The court of appeals held that the plaintiff could not sue under the Controlled Substances Act, 21 U.S.C. §§ 801-971, because that statute was intended to protect "the public's interest in the legitimate use of controlled substances and to inhibit the pernicious consequences to the public's health and safety of illegitimate use" by preventing "the diversion of drugs from legitimate channels to illegitimate channels." *Id.* at 414-415. Because the plaintiff's criminal history indicated a risk of such diversion, his interest in employment as a pharmacist "conflict[ed] with the CSA's zone of interests." *Id.*[4]

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[4] Similarly, the D.C. Circuit's "policing" rationale would have led to the opposite result in *Stewart Park & Reserve Coalition, Inc. v. Slater*, 352 F.3d 545 (2d Cir. 2003), in which the Second Circuit dismissed a claim by environmental and recreational groups that highway construction should be enjoined under the Federal-Aid Highway Act, 23 U.S.C. § 111. The court reasoned that the plaintiffs' interest in enjoying

In short, while the factual scenarios in the cases vary, the conflict in the legal standards applied to determine prudential standing is stark. The D.C. Circuit grants prudential standing based on the alleged existence of an Article III injury that, in the court's view, invests the plaintiff with an interest in policing agency compliance with the law. The Fifth, Sixth, Seventh, and Eighth Circuits have specifically rejected that same formula for prudential standing.

2. The D.C. Circuit's Decision is Wrong and Contrary to this Court's Precedent

The D.C. Circuit's decision also runs afoul of this Court's prudential standing principles. This Court has long required an "unmistakable link" between the purpose of the statutory provision being enforced—the Reorganization Act's land-into-trust provision—and the interests advanced by the plaintiff. *National Credit Union*, 522 U.S. at 936 n.7. Patchak's claimed aesthetic and environmental injuries from gaming have no linkage to the operation of the Reorganization Act or its land-into-trust provision. The D.C. Circuit, however, bypassed that problem by holding that Patchak's mere allegation of gaming injuries made him an

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parklands threatened by the construction did not fall within the zone of interests protected by that statute, which was enacted to promote interstate and local commerce and defense. *Id.* at 561. In the D.C. Circuit, though, the *Stewart* plaintiffs would have had prudential standing, because their alleged injuries positioned them to police the manner in which highway construction went forward.

appropriate claimant to "police" the agency's compliance with the law. App., *infra*, 6a.

But this Court has held time and again that a plaintiff's interest in ensuring that the law is complied with is not a cognizable injury even for Article III purposes, because it does not differentiate the plaintiff from every citizen's interest in ensuring that the law is obeyed and properly executed. *See, e.g., Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441-1442 (2011); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). If such an interest is not even cognizable for purposes of Article III, it should not carry sufficient heft to bring plaintiffs across the prudential-standing threshold.

Furthermore, whether or not the existence of asserted injuries outside the statute's zone of interests invest a plaintiff with a distinct motive to police the statute's operation, "the essence of standing is not a question of motivation but of possession of the requisite * * * interest." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.21 (1982). And, for prudential standing purposes, that requisite interest must lie within the zone of interests of the statute being enforced.

B. In Conferring Prudential Standing Based On Interests Protected By Other Statutes, The D.C. Circuit's Decision Conflicts With The Law Of The Federal Circuit And Of This Court

Because Patchak's asserted injuries fall outside the zone of interests of the Reorganization Act's land-into-trust provision, the D.C. Circuit refused to "view[] the IRA provisions in isolation," App., *infra*, 9a, but instead invoked interests protected by other federal statutes. By looking outside "the statute whose violation is the gravamen of the complaint," *Lujan*, 497 U.S. at 886, however, the D.C. Circuit put its law into conflict with that of the Federal Circuit. In *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991), an animal-rights group sued under the APA, alleging that the patenting of "non-naturally occurring, non-human multicellular organisms" violated the patent laws. *Id.* at 922. Recognizing that its suit did not fall within the zone of interests protected by the patent statute, 35 U.S.C. § 101, the plaintiff invoked procedural interests protected by the APA. *Id.* at 937. Quoting *Lujan*'s requirement that prudential standing be evaluated with respect to "'the statute whose violation is the gravamen of the complaint,'" the Federal Circuit refused to look to a different statute (the APA) to support prudential standing under the patent laws. *Id.* "The patent statute, not section 706(2)(C) nor 553 of the APA, is the 'relevant statute' under section 702, and appellants have not alleged facts which place them within the 'zone of interests' addressed by the patent laws." *Id.* Were courts to open the door to prudential standing based on interests protected by

another statute that is not the "gravamen" of the complaint, the Federal Circuit ruled, "the 'zone of interest' limitation" could easily "be rendered nugatory." *Id.* at 937, 938.

The D.C. Circuit's rule also would have led to a different result in *Kyles v. J.K. Guardian Securities Services, Inc.*, 222 F.3d 289 (7th Cir. 2000). There, the court of appeals held that employment discrimination "testers" (*i.e.*, individuals who apply for jobs as an experiment to determine whether an employer is discriminating) had standing to sue under Title VII, 42 U.S.C. § 2000e, but did not fall within the "zone of interests" of 42 U.S.C. § 1981 because the testers never intended to form employment contracts with the employers. 222 F.3d at 301-304. In the D.C. Circuit, however, the *Kyles* plaintiffs would have been able to "borrow" the interests from Title VII to give themselves standing under Section 1981, just as the D.C. Circuit allowed Patchak to rely on interests protected by the Indian Gaming Regulatory Act to establish prudential standing to enforce the Reorganization Act.

The Federal Circuit's rule, while irreconcilable with the D.C. Circuit's decision here, closely hews to this Court's precedent. This Court has consistently defined the "zone of interests" test in terms of the *particular provision* of the *particular statute* under which the plaintiff is suing. *See, e.g.*, *Bennett*, 520 U.S. at 162, 176 ("[A] plaintiff's grievance must arguably fall within the zone of interests * * * sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."); *accord Thompson*, 131 S. Ct. at 870 (same); *Air*

Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 523-524 (1991) ("[T]he plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

To be sure, the Court has allowed a plaintiff suing under one statutory provision to invoke prudential standing based on the interests served by another provision *of the same statute*, *see Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 401 (1987), but even then only if the two provisions have an "integral relationship," *Air Courier*, 498 U.S. at 529-530.

Confining a plaintiff's standing to the statute being enforced, moreover, is critical to ensuring that the prudential standing doctrine performs its essential filtering function. Focus on the statute being enforced ensures the close relevance of the plaintiff's claims to the issues at stake in the litigation, thereby promoting the concrete adverseness and personalized stake *in the claim being adjudicated* that standing principles require. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (prudential standing inquiry tests whether "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief"); *Clarke*, 479 U.S. at 397 ("[T]he 'zone of interest' inquiry * * * seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.").

Limiting prudential standing to those whose interests are directly affected by the statute being enforced also ensures that the plaintiff's interests are distinct from citizens' general interest in ensuring governmental compliance with the law. *See Warth*, 422 U.S. at 500 (prudential limitations prevent courts from "be[ing] called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions"); *Fairchild v. Hughes*, 258 U.S. 126, 129-130 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law," but "[o]bviously this general right does not entitle a private citizen to institute in the federal courts a suit.").

Finally, a tight nexus between the plaintiff's asserted injuries and the statute being enforced ensures that the court's resolution of the questions raised and relief ordered will, in fact, directly remediate the injury alleged. For example, enjoining the procurement decisions at issue in *American Federation*, *supra*, and *Courtney*, *supra*, might not have guaranteed the particular plaintiffs themselves further employment. Similarly, enjoining the DEA rule in *Bonds*, *supra*, might not have provided the plaintiff a pharmacy job. Because the statute sued under in each of those cases was not designed to remediate the particular interest asserted by each plaintiff, there was an inherent risk that a judicial decision would not have been able to redress an interest arising outside the statute's zone of interests.

Likewise here, taking the entire 147 acres out of trust under the IRA would not itself determine whether gaming could go forward. Lots of private gaming facilities (virtually all, if not all, of Las Vegas, for example) operate on non-trust land. Gaming on private land held in fee simple (whether by tribes or anyone else) is determined by state law, not federal law. Insisting that the plaintiff's alleged injuries fall within the zone of interests of the federal statute actually being litigated thus reinforces the Article III requirement that the judicial relief ordered under that federal law be independently capable of redressing the injury alleged. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

C. This Court's Immediate Review Is Needed To Resolve Those Circuit Splits

Much as it has in the context of immunity questions, this Court has granted certiorari at the interlocutory stages of litigation to resolve important questions of standing to bring suit. The procedural history in *Valley Forge*, for example, mirrored that in this case: the district court dismissed the suit for lack of standing and the court of appeals reversed and remanded. 454 U.S. at 469-470. Rather than waiting for resolution on the merits, this Court granted certiorari "[b]ecause of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals." *Id.* at 470. *See Lujan*, 497 U.S. at 881 (granting certiorari immediately after court of

appeals had reversed district court's dismissal for lack of standing); *Allen v. Wright*, 468 U.S. 737, 748-750 (1984) (same). Because the D.C. Circuit's decision is an unprecedented expansion of the prudential standing doctrine in a manner specifically rejected by five other circuits, immediate review is equally appropriate in this case.

That is particularly true because prudential standing, like the Quiet Title Act sovereign immunity question, is a threshold issue. Because such sovereign immunity questions are routinely granted review on an interlocutory basis, disposing of both threshold issues at once would best promote judicial economy. In addition, because both the prudential standing inquiry and sovereign immunity analyses have important implications for the volume of litigation against federal agencies generally, review of both questions simultaneously will allow the Court to comprehensively evaluate the D.C. Circuit's holding and its unique impact, given the D.C. Circuit's broad jurisdiction over suits against the federal government.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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August 25, 2011

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2010
Decided January 21, 2011

No. 09-5324

DAVID PATCHAK,
APPELLANT

v.

KENNETH LEE SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

John J. Bursch argued the cause for appellant. With him on the briefs was *Daniel P. Ettinger*.

Aaron P. Avila, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief was *Elizabeth Ann Peterson*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Edward C. DuMont argued the cause for appellee Match-E-Be-Nash-She-Wish band of Pottawatomi Indians. With him on the brief were *Seth P.*

Waxman, *Demian S. Ahn*, *Conly J. Schulte*, and *Shilee T. Mullin*.

John H. Dossett and *Riyaz A. Kanji* were on the brief for *amicus curiae* National Congress of American Indians in support of appellees.

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: The district court dismissed David Patchak's suit to prevent the Secretary of the Interior from holding land in trust for an Indian tribe in Michigan. Patchak's appeal presents two jurisdictional issues: whether, as the district court held, he lacks standing; and whether, if he has standing, sovereign immunity bars his suit.

The land consists of 147 acres in Wayland Township, Michigan, a rural, sparsely populated farming community. The Secretary published in the Federal Register his decision to take this property—the Bradley Tract—into trust for the Match-E-Be-Nash-She-Wish Band, also known as the Gun Lake Band. 70 Fed. Reg. 25,596 (May 13, 2005). The Band owned the land and wanted to construct and operate a gambling facility there. To do this, the Band had to convince the Interior Secretary to take title to the land into trust pursuant to the Indian Gaming Regulatory Act. *See* 25 U.S.C. §§ 2701–21; *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 191-92 (D.C. Cir. 2010).

The Secretary's notice in the Federal Register announced that he would wait at least thirty days before consummating the transaction. The purpose of the delay, which 25 C.F.R. § 151.12(b) required, was "to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." 70 Fed. Reg. at 25,596.

During the thirty-day period, an anti-gambling organization—"MichGO"—brought an action claiming that the Secretary had violated the National Environmental Policy Act and the Indian Gaming Regulatory Act. The district court issued a stay of the Secretary's action. The court later dismissed the organization's suit, and this court affirmed. *See Mich. Gambling Opposition (MichGO) v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *aff'd sub nom. Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).

In the meantime, Patchak filed his complaint. He alleged that he lived near the Bradley Tract; that the Tribe's gaming facility would attract 3.1 million visitors per year; that this would destroy the peace and quiet of the area; that there would be air, noise and water pollution; that there would be increased crime in the area and a diversion of police and medical resources; and that the Secretary's proposed action was *ultra vires*. Patchak invoked general federal question jurisdiction and the Administrative Procedure Act. He claimed that because the Gun Lake Band was not under federal jurisdiction in 1934, the Indian Reorganization Act of 1934, 25

U.S.C. §§ 461-79, did not authorize the Secretary to take the Band's land into trust. The Gun Lake Band intervened as a defendant.

After this court affirmed the dismissal of the *MichGO* action, the stay expired. The district court then denied Patchak's emergency motion for an order preventing the Secretary from proceeding with the land transaction. On January 30, 2009, the Secretary took the Bradley Tract into trust. Three weeks later, on February 24, the Supreme Court issued its opinion in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). The Court agreed with Patchak's argument that § 479 of the Indian Reorganization Act—the IRA—limited the Secretary's trust authority to Indian tribes under federal jurisdiction when the IRA became law in 1934.

Despite *Carcieri*, the Secretary urged the district court to dismiss Patchak's suit. He argued that the Quiet Title Act, 28 U.S.C. § 2409a, precluded any person from seeking to divest the United States of title to Indian trust lands. In other words, by taking the Bradley Tract into trust for the Gun Lake Band while Patchak's suit was pending, the Secretary deprived the court of jurisdiction.

In August 2009, the district court dismissed the suit on a different ground—namely, that Patchak, "at a minimum, lacks prudential standing to challenge Interior's authority pursuant to section 5 of the IRA." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The court reasoned that Patchak's "interests do not only not fall within the IRA's zone-of-interests, but actively run contrary to it." *Id.* at 78. The court

also expressed doubt about its subject matter jurisdiction in light of the Quiet Title Act. *Id.* at 78 n.12.

I

There is no doubt that Patchak satisfied the standing requirements derived from Article III of the Constitution. Neither the Secretary nor the Band argues otherwise. In terms of Article III standing, the impact of the Band's facility on Patchak's way of life constituted an injury-in-fact fairly traceable to the Secretary's fee-to-trust decision, an injury the court could redress with an injunction that would in effect prevent the Band from conducting gaming on the property. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

We believe, contrary to the district court, that Patchak also fulfilled the judicially created zone-of-interests test for standing. The test began as a "gloss" on § 702 of the Administrative Procedure Act, 5 U.S.C. § 702. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395-96 (1987). Section 702 allows judicial review of agency action by a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." As the Supreme Court formulated the test in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970), the "adversely affected or aggrieved" plaintiff must be trying to protect an interest of his that is "*arguably* within the zone of interests to be protected" by the "relevant" statutory provisions. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522

U.S. 479, 492 (1998).

The Supreme Court introduced the zone-of-interests test in recognition of the "trend . . . toward enlargement of the class of people who may protest administrative action." *Data Processing*, 397 U.S. at 154. The APA had "pared back traditional prudential limitations." *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985). Given the APA's "generous review provisions," *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (internal quotation marks omitted), and the "drive for enlarging the category of aggrieved 'persons,'" *Data Processing*, 397 U.S. at 154, the test is not "especially demanding," *Clarke*, 479 U.S. at 399-400.

The Secretary tells us that the Indian Reorganization Act is "not concerned with the interests that Patchak asserts in this litigation." DOI Br. 31. The Band adds that the function of the IRA is to "give the Indians the control of their own affairs and of their own property." *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting 78 Cong. Rec. 11125 (1934)). But application of the zone-of-interests test does not turn on such generalities. *See Nat'l Credit Union Admin.*, 522 U.S. at 492-93. Patchak did not have to show that the Indian Reorganization Act was meant to benefit those in his situation. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *Am. Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 815 (D.C. Cir. 2005). The "analysis focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." *Mova*, 140 F.3d at 1075.

As the Secretary's announcement in the Federal Register stated, IRA § 465 (and the definition of Indians in § 479)[1] served as the predicate for the

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[1] Section 465 states:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual

government's taking the Gun Lake Band's property into trust for the purpose of gaming under § 2719(b)(1)(B)(ii) of the Gaming Act.[2] The IRA provisions interpreted in *Carcieri v. Salazar*, 129 S.Ct. at 1066, limit the Secretary's trust authority. He may act only on behalf of tribes that were under federal jurisdiction at the time of the IRA's enactment in 1934. When that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from

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> Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Section 479 defines "Indians" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."

[2] *See* 70 Fed. Reg. at 25,596. The Gaming Act permits federally recognized Indian tribes to conduct gaming on "Indian lands." The Act defines "Indian lands" to mean all lands within any Indian reservation and "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . .." 25 U.S.C. § 2703(4). Indian gaming is not permitted on "newly acquired lands"—that is, lands the Secretary took into trust for a tribe after October 17, 1988, when the Gaming Act went into effect. An exception to this bar, on which the Secretary relied in accepting the Bradley Tract, allows Indian gaming on lands the Secretary takes into trust after the 1988 date "as part of . . . the initial reservation of an Indian tribe." *Id.* § 2719(b)(1)(B)(ii); *see Butte Cnty., Cal.*, 613 F.3d at 191-92.

living near a gambling operation—are arguably protected. And because of their interests, they are proper parties to enforce the IRA's restrictions.

In reaching this conclusion, we have not—as the Secretary would have it—viewed the IRA provisions in isolation. Patchak's asserted injuries are the "negative effects of building and operating a casino" in his community. The Secretary claims that these "vague and generalized grievances have nothing to do with the purposes for which Congress enacted 25 U.S.C. § 465" and thus do not grant him prudential standing. DOI Br. 32. But Patchak's standing—for purposes of both Article III and the zone-of-interests test—must be evaluated in light of the intended use of the property. The IRA provisions are linked to the Gaming Act. *See Air Courier Conference of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 530 (1991). In its fee-to-trust application filed with the Secretary, the Gun Lake Band invoked both statutes. One of the considerations in the Secretary's decision whether to take land into trust pursuant to the IRA is whether doing so would "further economic development . . . among the Tribes." *See Mich. Gambling Opposition*, 525 F.3d at 31. Indian gaming is meant to do just that. 25 U.S.C. § 2701(4). Taken together, the limitations in these statutes arguably protected Patchak from the "negative effects" of an Indian gambling facility.

The Interior Department itself recognizes the interests of individuals like Patchak who live close to proposed Indian gaming establishments. A regulation already mentioned (25 C.F.R. § 151.12(b)) gives "affected members of the public" thirty days to seek

judicial review before the Secretary takes land into trust for an Indian tribe. 61 Fed. Reg. 18,082 (1996). By any measure, Patchak fits within the category of "affected members of the public." Other regulations require the Secretary to consider the purpose for which the land will be used and whether taking a tribe's land into trust would give rise to "potential conflicts of land use." 25 C.F.R. § 151.10(c), (f). Internal memoranda regarding the Band's application show that members of the Interior Department considered such conflicts here and accepted the Wayland Township Supervisor's assertion that the gaming facility would be "compatible with the surrounding land use." We realize that the APA and *Data Processing* require the litigant's interests to be measured by statutes not regulations. *See Nat'l Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1043 (D.C. Cir. 1989). But regulations implementing statutes may cast some light on what the statutes arguably protect.

The Secretary argues that the State of Michigan, not Patchak, is the proper entity to police the Secretary's authority to take lands into trust under the IRA. He acknowledges cases in which states or municipalities or their officials have been allowed to sue to prevent the Secretary from taking land into trust for the purposes of Indian gaming. *See, e.g., Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, 625 F.3d 501 (8th Cir. 2010); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001). *Carcieri v. Salazar* is another example, although the land there was to be used for Indian housing rather than gaming. 129 S.Ct. at 1060. (The plaintiffs in *Carcieri* were a town, a state and the governor.) The Secretary

offers a distinction between those cases and Patchak's: a state in which the land is located is a proper entity to police the Secretary's trust decision "because it stands to lose some of its regulatory authority as a result of Interior's trust acquisition." DOI Br. 36-37. But the distinction cannot hold. If the interests of a state or a municipality are within the zone of interests the IRA protects then so are Patchak's interests. A state may, as the Secretary contends, lose some regulatory authority and, depending on the intended use of the trust land, some tax revenue. *But see Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989). But the Secretary is merely describing the nature of the state's injuries. Patchak's injuries may be different, but they are just as cognizable. Among other things, he alleged that the rural character of the area would be destroyed, that the value of his property would be diminished and that he would lose the enjoyment of the agricultural land surrounding the casino site. These sorts of injuries have long been considered sufficient for purposes of standing. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

As a practical matter it would be very strange to deny Patchak standing in this case. His stake in opposing the Band's casino is intense and obvious. The zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Patchak is surely not in that category. We therefore hold that he had prudential standing to bring this

action.

II

This brings us to the question whether the government has consented to Patchak's suit.

Section 702 of the APA waives the government's sovereign immunity in the following terms: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702. Patchak does not seek money damages and he has stated a claim that an agency—the Interior Department—and its Secretary acted under color of legal authority.

Patchak's action therefore seems to fit within the waiver of sovereign immunity in § 702. But the last clause of the section states: "Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Secretary argues that the Quiet Title Act is such a statute.

We set forth the relevant provisions of the Quiet Title Act in the margin.[3] The Act, in its first

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[3] 28 U.S.C. § 2409a provides in relevant part:

subsection, waives sovereign immunity: "The United

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). This is followed by the provision that directly concerns us: "This section does not apply to trust or restricted Indian lands . . .." *Ibid.* The Supreme Court has held that the Act provides "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property," *Block v. North Dakota*, 461 U.S. 273, 286 (1983), and that, when applicable, the Indian lands exception operates "to retain the United States' immunity to suit," *United States v. Mottaz*, 76 U.S. 834, 842 (1986).

The proper question therefore is whether Patchak's suit is, in the words of the statute, the sort of "action under this section" for which the United States has waived sovereign immunity except with respect to Indian lands. That is, did Patchak bring a Quiet Title Act case? *Cf. Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992). If not, the Quiet Title Act does not forbid the relief Patchak seeks, and the APA has waived the government's immunity from suit. *Id.* at 609; *see also Block v. North Dakota*, 461 U.S. 273, 286 n.22 (1983).

The official name of the Quiet Title Act, passed in 1972, was "An Act to permit suits to adjudicate certain real property quiet title actions." Pub. L. No.

92-562, 86 Stat. 1176.[4] This provides a clue about the statute's coverage. Actions to "quiet title" originated in the courts of equity as a means of preventing a multiplicity of suits at law. 4 POMEROY, EQUITY JURISPRUDENCE § 1394 (5th ed. 1941). Referred to as either "bills of peace" or "bills *quia timet*," they existed in two forms. The first allowed the holder of legal title to land to prevent a single adverse claimant from bringing successive actions of ejectment against the plaintiff for the same parcel. 1 *Id.* § 253. For equity to intervene, the plaintiff was required to be in possession of the land and to have sufficiently established his title in at least one previous action at law. *Ibid.* The second form allowed the holder of legal or equitable title to land to bring one suit against many persons asserting equitable titles to the same land. 4 *Id.* § 1396. Like the first form, plaintiffs were required to be in possession of the land in dispute. *Ibid.* Later statutes expanded quiet title actions, sometimes removing the requirement of possession, *ibid.*, and often allowing the actions to determine ownership. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 551 (3d ed. 2002).

As should be apparent from this summary, a

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[4] Before enactment of the Quiet Title Act, an adverse claimant's only legal remedy was an action for just compensation under the Tucker Act, 28 U.S.C. § 1491. Unless the United States voluntarily instituted a quiet title action or the claimant successfully petitioned Congress or the Executive for discretionary relief, he could not recover possession of the property. *See Block*, 461 U.S. at 280-81.

common feature of quiet title actions is missing from this case. In each of the forms just mentioned, the plaintiff would seek to establish his rightful title to the real property. The modern definition of the action is the same: "A proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it." BLACK'S LAW DICTIONARY 34 (9th ed. 2009). Patchak is not requesting relief of that sort; he mounts no claim of ownership of the Bradley Tract. We recognize that the title of a statute cannot alter the meaning of the statute's operative language. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). But it is of some interpretive use. *Ibid.* And here there is more than just the title. As part of the same 1972 legislation, Congress amended the venue statute to provide that "[a]ny civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States" shall be brought in the district where the property is located. 28 U.S.C. § 1402(d).[5] Congress also gave the district courts jurisdiction over civil actions "under section 2409a to quiet title." 28 U.S.C. § 1346(f). Congress thus viewed § 2409a as authorizing a proceeding known as a "quiet title" action. And the language of § 2409a firmly indicates that Congress intended to enact legislation building upon the traditional concept of an

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[5] *See also* 28 U.S.C. § 2410(a)(1), dealing with "quiet title" actions involving property in which the United States holds a security interest.

action to quiet title.[6]

This much is apparent from the Act's pleading requirement. "The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstance under which it was acquired . . .." 28 U.S.C. § 2409a(d). Failure to comply may result in

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[6] As the Department of Justice put it:

> The bill would allow the United States to be made a party to an action in the Federal district courts to quiet title to lands in which the United States claims an interest.
>
> Suits to quiet title or to remove a cloud on title originated in the equity court of England. They were in the nature of bills *quia timet*, which allowed the plaintiff to institute suit when an action would not lie in a court of law. For instance, a plaintiff whose title to land was continually being subjected to litigation in the law courts could bring a suit to quiet title in a court of equity in order to obtain an adjudication on title and relief against further suits. Similarly, one who feared that an outstand [sic] deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title. The plaintiff in such suits was required to be in possession, and the usual grounds of equitable jurisdiction (an imminent threat and an inadequate remedy at law) had to be present.

Letter from Attorney General to Speaker, House of Representatives, *reprinted in* H.R. Rep. No. 92-1559, at 8-9 (1972).

dismissal of the complaint. *See, e.g., Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978). This provision tells us what constitutes an "action under this section." 28 U.S.C. § 2409a(a). It is an action in which the plaintiff is claiming an interest in real property contrary to the government's claim of interest. Neither the brief of the Secretary nor that of the Band confronts this language.

Nor do they deal with subsection (b) of the Act. This provision gives the United States the option of retaining possession of the property if it loses the quiet title action, so long as the government pays just compensation to the person entitled to the property. *Id.* § 2409a(b). The provision is senseless unless there is someone else—the plaintiff—claiming ownership. Again, the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit.

The origins of the Act and the committee reports accompanying it contain examples of the types of suits the legislation was expected to cover. *See Suits to Adjudicate Disputed Titles to Land in Which the United States Claims an Interest: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary on S. 216*, 95th Cong. 2-6 (1972) (statement of Sen. Frank Church) ("House Judiciary Committee Hearing"); H.R. Rep. No. 92-1559 (1972); S. Rep. No. 92-575 (1971). All of these examples were suits in which plaintiffs claimed title to property. *E.g.*, H.R. Rep. No. 92-1559, at 6; S. Rep. No. 92-575, at 1, 5; *Dispute of Titles on Public Lands: Hearing Before the Subcomm. on Pub. Lands of the S. Comm. on Interior and Insular Affairs*, 92d Congress 20, 55 (1971);

House Judiciary Committee Hearing, *supra*, at 45-46 (statement of R. Blair Reynolds).

Two Supreme Court decisions have interpreted the Quiet Title Act. Neither is inconsistent with our view that Patchak's suit is not an action under that statute, although the government and the Band try to convince us otherwise. *Block v. North Dakota*, 461 U.S. 273 (1983), was a typical quiet title action. As the Court put it, "the United States and North Dakota assert competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota." *Id.* at 277. The Court held in *Block* that the Quiet Title Act was "the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id.* at 286. But by "adverse claimant" the Court meant "States and all others asserting title to land claimed by the United States," *id.* at 280, a description that does not fit Patchak.

Three years later, the Court took up the Quiet Title Act once more in *United States v. Mottaz*, 476 U.S. 834 (1986). The issue was, as in *Block*, the applicability of the Act's twelve-year statute of limitations. The plaintiff claimed that the Bureau of Indian Affairs had sold three parcels of land in which she had an interest to the United States Forest Service and the Chippewa National Forest "without [her] consent or permission." *Id.* at 838. She requested "[d]amages in a monetary sum equal to the current fair market value of each parcel illegally transferred," invoking several jurisdictional grants (not including the Quiet Title Act). *Ibid.* (internal quotation marks omitted) (alteration in original). The

Court held again that the Quiet Title Act provides the exclusive means for "adverse claimants" to challenge the United States' title. *Id.* at 841. Mottaz sought "a declaration that she alone possesses valid title to her interests in the [parcels of land] and that the title asserted by the United States is defective." *Id.* at 842. Her claim was therefore "clearly . . . within the Act's scope." *Ibid.* Because her claim had accrued more than twelve years before she filed her complaint, it was barred. *Id.* at 844.

In short, the plaintiffs in *Block* and *Mottaz* were the type of "adverse claimants" traditionally found in quiet title actions. Patchak's position is different. He does not seek a declaration that "[]he alone possesses valid title" to the Bradley Tract, *Mottaz*, 476 U.S. at 842, and he is not an adverse claimant.

We acknowledge the views of the Ninth, Tenth and Eleventh Circuits that this difference does not matter, that the Quiet Title Act bars suits seeking to "divest[] the United States of its title to land held for the benefit of an Indian tribe," whether or not the plaintiff asserts any claim to title in the land. *Fla. Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248, 1253-55 (11th Cir. 1985); *see also Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-63 (10th Cir. 2004); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987).

These opinions appear to rest on two related rationales, neither of which we find convincing. The first is that the legislative history of the Indian lands exception shows that it rested on the federal government's "solemn obligations . . . to the Indian

people." *Neighbors*, 379 F.3d at 962 (quoting H.R. Rep. No. 92-1559, at 13 (1972) (letter from Mitchell Melich, Solicitor for the Dep't of the Interior)); *see also Metro. Water Dist.*, 830 F.2d at 143-44; *Fla. Dep't*, 768 F.2d at 1253-54. This may be true, but we do not see why that should alter our analysis. If Patchak's suit is the type of quiet title action the Act governs, then the fact that the disputed property is Indian trust land means that government has not waived sovereign immunity. It also means that Patchak could not rely on § 702 of the APA to supply the missing consent to suit. On the other hand, if—as we believe—Patchak's suit is not governed by the Quiet Title Act, then § 702 of the APA waives the government's sovereign immunity.

The second rationale is this: "If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust lands." *Neighbors*, 379 F.3d at 963; *see Fla. Dep't*, 768 F.2d at 1254-55. We do not find the point at all telling. Congress passed the Quiet Title Act in 1972. At the time there was no general waiver of the government's sovereign immunity for non-monetary actions. The 1972 Congress therefore did not have to concern itself with plaintiffs such as Patchak who were not seeking to quiet title. Patchak could not have successfully sued the United States over the Bradley Tract even if Congress had not inserted the Indian lands exception in the Quiet Title Act. Given these circumstances, it seems to us rather far-fetched to attribute an intention to the 1972 Congress about a subject not

within the terms of the statutory language.

Matters changed in 1976 when Congress amended the APA to include a general waiver of sovereign immunity. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. § 702). This legislation, recommended by the Administrative Conference of the United States[7] and supported by the Department of Justice,[8] was consistent with the trend toward easing restrictions on judicial review of administrative action, a trend identified in *Data Processing*, 397 U.S. at 154, and its companion case, *Barlow v. Collins*, 397 U.S. 159, 166 (1970). As then–Assistant Attorney General Antonin Scalia explained in a letter to Senator Kennedy, one of the main reasons for abolishing sovereign immunity in these kinds of cases was "the failure of the criteria for sovereign immunity, as they have been expressed in a long and bewildering series of Supreme Court cases, to bear any relationship to the real factors" that should control.[9] By waiving sovereign immunity, Congress sought to ensure that courts could review

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[7] 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 23-24 (1970).

[8] Letter from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, to Edward M. Kennedy, Chairman, Subcomm. on Admin. Practice & Procedure, U.S. Senate, *reprinted in* H.R. Rep. No. 94-1656, at 25.

[9] Letter from Antonin Scalia, *supra* note 8, at 26; see also Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

"the legality of official conduct which adversely affects private persons." H.R. Rep. No. 94-1656, at 5. As the House Report put it:

> Just as there is little reason why the United States as a landowner should be treated any differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or offer acting in an official capacity.

Id. at 9.

We may agree that the Quiet Title Act of 1972 reflects a congressional policy of honoring the federal government's solemn obligations to Indians with respect to title disputes over Indian trust land. We may also agree that the amendment to § 702 of the APA in 1976 reflects a congressional policy of easing restrictions on judicial review of agency action seeking non-monetary relief. Which of these policies should prevail? The courts of appeals mentioned above have extended the reach of the Quiet Title Act beyond its text to favor one policy without giving any indication that they considered the other. For our part, we agree with the Supreme Court in *Carcieri* that we need not chose between "these competing policy views." 129 S.Ct. at 1066-67. For the reasons we have discussed, it is enough that the terms of the Quiet Title Act do not cover Patchak's suit. His action

therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA.[10]

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The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[10] In light of our determination that the Quiet Title Act does not bar Patchak's claim, we do not address whether sovereign immunity should be determined as of the date his complaint was filed rather than after the Secretary took the land into trust. *Cf. Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 570 (2004). We also decline Patchak's request that we decide whether the Band was under federal jurisdiction in 1934, or any other remaining issues. *See Doe v. diGenova*, 779 F.2d 74, 89 (D.C. Cir. 1985).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 08-1331
KEN L. SALAZAR, Secretary of the Interior, and LARRY ECHO HAWK, In his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs,[1]	)	(RJL)
	)	
Defendants,	)	
	)	
and	)	
	)	
MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,	)	
	)	
Intervenor-Defendant.	)	

[1] Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the Court will automatically substitute that officer's successor. Accordingly, the Court substitutes Ken L. Salazar for Dirk Kempthorne and Larry Echo Hawk for Carl J. Artman.

MEMORANDUM OPINION

(August 19, 2009) [#19, #20, #36, #41, #46, #52]

Plaintiff David Patchak brings this lawsuit challenging the Secretary of the Interior's ("Secretary" or "United States") decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of intervenor-defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. Plaintiff seeks an injunction barring the Secretary from taking the land into trust on the basis that the Tribe was not under Federal jurisdiction in June 1934, as required by the IRA. (Compl. ¶ 28 [Dkt. #1].) Presently before the Court is the United States' Motion to Dismiss [Dkt. #20], the Tribe's Motion for Judgment on the Pleadings [Dkt. #19], and plaintiff's motions for preliminary injunctive relief [Dkt. #s 36, 46]. Because plaintiff fails to establish prudential standing, the Court will GRANT the Motion to Dismiss and Motion for Judgment on the Pleadings and will DENY the motions for preliminary injunctive relief.

BACKGROUND

In May 2005, the Bureau of Indian Affairs of the Department of Interior announced that it would take 147 acres of land in Wayland Township, Michigan, (the "Bradley Property") into trust for the Tribe pursuant to section 5 of the IRA, (Compl. ¶ 21), which authorizes the Secretary to take land into trust "for

the purpose of providing land for Indians."[2] Notice of Final Agency Determination to take Land into Trust Under 25 C.F.R. Part 151, 70 Fed. Reg. 25,596 (Bureau of Indian Affairs, Interior, May 13, 2005). The Tribe had petitioned Interior in 2001 to take the property into trust, and the Tribe plans to construct and operate a casino on the property to promote economic self-sufficiency and advance its members' economic well-being. (Compl. ¶ 20); *see generally Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008) ("*MichGO II*").

Shortly after Interior's announcement, the non-

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[2] Section 5 of the IRA provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * *
>
> Title to any lands or rights acquired pursuant to this Act ... shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479.

profit membership organization Michigan Gambling Opposition ("MichGO") filed a lawsuit in this district in an effort to obstruct the proposed casino.[3] MichGO alleged that Interior's approval of the casino violated both the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq.*, and the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.* MichGO also contended that section 5 of the IRA was an unconstitutional delegation of legislative authority. The district court granted summary judgment for the defendants in February 2007, *Michigan Gambling Opposition v. Norton*, 477 F. Supp. 2d 1, 22 (D.D.C. 2007) ("*MichGO I*"), and our Court of Appeals affirmed in April 2008, *MichGO II*, 525 F.3d at 26. MichGO's petition for rehearing *en banc* review was subsequently denied in July 2008.[4] *Michigan Gambling Opposition v. Kempthorne*, No. 07-5092 (D.C. Cir., Order filed July 25, 2008) ("*MichGo III*").

Plaintiff filed the present lawsuit shortly thereafter, on August 1, 2008, pursuant to § 702 of the Administrative Procedure Act ("APA"). Plaintiff alleges that the Tribe was not under Federal

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[3] MichGO filed its lawsuit during the required 30-day waiting period following Interior's announcement of its decision to take the land into trust. *See* 25 C.F.R. § 151.12(b).

[4] Our Court of Appeals granted, however, MichGO's motion to stay issuance of the mandate pending the Supreme Court's decision on MichGO's pending petition for a writ of certiorari, *MichGo III*, No. 07-5092 (D.C. Cir., Order filed Aug. 15, 2008), thereby precluding Interior from taking the land into trust immediately

jurisdiction in June 1934, when the IRA was enacted, and therefore Interior lacks authority to take the Bradley Property into trust for the Tribe under section 5 of the IRA. (Compl. ¶¶ 25-33.) Plaintiff further alleges that if the property is taken into trust, his rural lifestyle and community will be adversely affected by the proposed casino.[5] (Compl. ¶ 9.) The catalyst for plaintiff's lawsuit—filed *three years* after Interior's announcement of its decision to take the land into trust—was the Supreme Court's grant of a

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[5] In his complaint, plaintiff describes his injuries as follows:

> Mr. Patchak will be disproportionately affected if the Property is placed in trust and the Gun Lake Band follows through with its plans to build a 200,000-square-foot casino complex that is anticipated to draw more than 3.1 million visitors a year. Such a casino would detract from the quiet, family atmosphere of the surrounding rural area. Among the negative effects of building and operating the anticipated casino in Mr. Patchak's community are: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.
>
> (Compl. ¶ 9.)

petition for a writ of certiorari in February 2008 to review the First Circuit's unrelated decision in *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *certiorari granted in part*, 128 S. Ct. 1443 (2008).[6] (*See* Compl. ¶¶ 29-30, 33). In *Carcieri*, the First Circuit had held that Interior had the authority to take land into trust for the Narragansett Indian Tribe in Rhode Island under section 5 of the IRA despite the fact that the tribe was not under Federal jurisdiction when the IRA was enacted.[7] *Carcieri*, 497 F.3d at 34.

On October 6, 2008, both the United States and the Tribe filed Rule 12 motions seeking judgment in their favor on the basis that plaintiff lacks prudential standing.[8] While the United States' and the Tribe's motions were pending, plaintiff filed two motions for preliminary relief seeking orders enjoining Interior

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[6] During its appeal, MichGO attempted to add the same claim based on *Carcieri* that plaintiff advances here, but our Court of Appeals denied MichGO's motion to supplement. (*MichGo III*, No. 07-5092 (D.C. Cir., Order filed Mar. 19, 2008)).

[7] The Supreme Court ultimately reversed the First Circuit, holding that the phrase "now under federal jurisdiction," as part of the IRA's definition of "Indian," unambiguously refers to those tribes that were under Federal jurisdiction when then IRA was enacted in 1934. *Carcieri v. Salazar*, 129 S.Ct. 1058, 1061 (2009). Because the parties effectively conceded that the Narragansett Indian Tribe was not under Federal jurisdiction at that time, the Court held that Interior was without authority to take land into trust for the tribe. *Id.* at 1061, 1068

[8] Tribe also argues that plaintiff's claim is barred by the doctrine of laches.

from taking the land into trust if, and when, the Supreme Court denied MichGO's petition for a writ of certiorari.[9] The Court heard oral argument on plaintiff's motions for preliminary injunctive relief on January 26, 2009, at which time the Court denied plaintiff's request for a temporary restraining order and took plaintiff's request for a preliminary injunction under advisement.[10] For the following reasons, the Court agrees that plaintiff, at a minimum, lacks prudential standing to challenge Interior's authority pursuant to section 5 of the IRA.

ANALYSIS

The United States and the Tribe argue that plaintiff's interests are fundamentally at odds with the purpose of the IRA and therefore plaintiff does not fall within the IRA's "zone of interests" and lacks prudential standing. I agree.

Standing to pursue a claim encompasses two components: constitutional and prudential. *Hazardous Waste Treatment Council v. EPA*, 861

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[9] Plaintiff's second motion strategically sought an injunction enjoining Interior from taking the land into trust prior to a decision by this Court on plaintiff's first motion for preliminary injunctive relief.

[10] The Supreme Court denied MichGO's petition for a writ of certiorari on January 21, 2009. (Joint Notice, Jan. 21, 2009 [Dkt. #45].) The Court of Appeals' mandate issued January 27, 2009, and Interior took the Bradley Property into trust for the Tribe on January 30, 2009. (Defs.' Notice, Jan. 30, 2009 [Dkt. #49].)

F.2d 277, 281 (D.C. Cir. 1988). As to the former, a plaintiff must allege "that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (internal quotation marks omitted). As to the latter, the "plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287 (D.C. Cir. 2005). If a plaintiff's claim fails either component, the Court lacks subject matter jurisdiction over the lawsuit.

While the prudential standing requirement is "not meant to be especially demanding," it excludes plaintiffs whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987); *Hazardous Waste Treatment Council*, 861 F.2d at 283 (prudential standing test "demands less than a showing of congressional intent to benefit but more than a 'marginal relationship' to the statutory purposes" (internal alteration omitted)). Indeed, the idea behind the requirement is "a presumption that Congress intends to deny standing to 'those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.'" *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989) ("*Thomas*") (quoting *Clarke*, 479 U.S. at 397, n.12). Where, as here, a plaintiff's claim is

brought pursuant to the judicial review provisions of the APA, the Court looks to interests protected by the substantive provisions of the underlying statute. *See Bennett*, 520 U.S. at 175; *see also Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) ("The first step in the prudential standing analysis is to identify the interests protected by the statute.").

Plaintiff, without a doubt, is not an intended beneficiary of the IRA. The purpose and intent of the IRA is to enable tribal self-determination, self-government, and self-sufficiency in the aftermath of "a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citing H.R. Rep. No. 1804, 73d Cong. 2d Sess., 6 (1934)). As the Supreme Court itself noted, "[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974); *see also MichGO II*, 525 F.3d at 32 (overall purpose of the IRA is to "advance[e] economic development among American Indians"); *Feezor v. Babbitt*, 953 F.Supp. 1, 5 (D.D.C. 1996). In addition, Section 5's grant of authority to the Secretary to take land into trust at his discretion for Indians and Indian tribes serves the specific purpose of reversing the consequences of the federal government's previous allotment policy, which had resulted in many tribal lands being lost. *See MichGO II*, 525 F.3d at 31-32 (discussing section 5's role as part of a "broad effort to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies"). In short, both

the IRA as a whole, and section 5 in specific, operate to protect, and promote, tribal self-determination and economic independence.

Plaintiff's alleged injuries could not be further divorced from these objectives. Plaintiff is not an Indian, nor does he purport to seek to protect or vindicate the interests of any Indians or Indian tribes. Rather, plaintiff seeks to vindicate only his own environmental and private economic interests. (Compl. ¶ 9.) Plaintiff also fails to point to any explicit, or implicit, indication in the IRA or its legislative history that the statute is intended protect, or benefit, an individual in plaintiff's position. In an effort to sidestep this paucity of evidence, plaintiff alleges instead that he has a general interest in ensuring that only qualified tribes receive benefits under the IRA. But such an interest, if true, is indistinguishable from the general interest every citizen or taxpayer has in the government complying with the law. To find that plaintiff has prudential standing on this basis alone would make a mockery of the prudential standing doctrine altogether. *See Hazardous Waste Treatment Council,* 861 F.2d at 283 ("[A] rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue."). Indeed, this Court has held at least twice that merely being a taxpayer is insufficient to establish prudential standing under the IRA. *Sault Ste. Marie v. Andrus,* 458 F. Supp. 465, 468 (D.D.C. 1978) (individual taxpayers did not have prudential standing to challenge tribe's eligibility under IRA for

Secretary of Interior to take land into trust on tribe's behalf); *Tacoma v. Andrus*, No. 77-1423, slip op. at 4 (D.D.C. Jan. 20, 1978) [Dkt. #30-32 (same). Plaintiff, accordingly, does not fall within the group of those "who in practice can be expected to police the interests" protected by the IRA, *Mova Pharm. Corp.*, 140 F.3d at 1075, but rather is one whose "suit[ ][is] more likely to frustrate than to further statutory objectives," *Thomas*, 885 F.2d at 922 (internal quotation marks omitted).[11]

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[11] Plaintiff's reliance on cases involving challenges to proposed casinos under IGRA and NEPA also cannot save plaintiff's case. Unlike IGRA and NEPA, no evidence indicates that the IRA focuses on or otherwise seeks to protect the interests of the surrounding community or the environment. IGRA, for example, only permits gaming on lands taken into trust after October 1988 if the land is an "initial reservation" unless there has been a finding that gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Similarly, NEPA's overarching focus is environmental interests, and it requires agencies take a "hard look" at the environmental consequences of their pro-posed courses of action. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989). Because there is no evidence that Congress similarly enacted the IRA to protect any such interests, cases finding prudential standing under IGRA and NEPA are inapposite. *E.g.*, *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 464 (D.C. Cir. 2007) (plaintiffs had prudential standing to challenge Secretary's interpretation of "initial reservation" exception be-cause "inclusion of [the surrounding community] provision demonstrates that Congress could not have intended to preclude efforts to enforce it, even if enforcement might prevent a landless tribe from gaining the benefits of IGRA"); *TOMAC v. Norton*, 193 F.Supp.2d 182, 189-90 (D.D.C. 2002) (citizens organization had prudential standing

Accordingly, because plaintiff's interests do not only not fall within the IRA's zone-of-interests, but actively run contrary to it, plaintiff lacks prudential standing. As a result, this Court lacks subject matter jurisdiction over this case and must, and will GRANT the United States' Motion to Dismiss and the Tribe's Motion for Judgment on the Pleadings.[12] Accordingly, plaintiff's outstanding motions, including his motions for preliminary injunctive relief, are DENIED.[13]

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under IGRA and NEPA to challenge certain aspects of Bureau of Indian Affairs' decision to take land into trust for a tribe planning to construct a casino). Indeed, many, if not all, of the injuries plaintiff alleges were previously alleged by the plaintiff in the MichGO action, which *was* brought pursuant to IGRA and NEPA. *Compare* Compl. ¶ 9 *with MichGO I*, 477 F. Supp. 2d at 3.

[12] The Court's continuing subject matter jurisdiction over this case is also seriously in doubt given that Interior took the land into trust on January 30, 2009. Under the Indian lands exception to the Quiet Title Act, the United States' waiver of sovereign immunity in civil actions "to adjudicate a disputed title to real property in which the United States claims an interest" does not apply "to trust or restricted Indian lands." 28 U.S.C. § 2409a(a); *see, e.g., Governor of Kansas v. Kempthorne*, 516 F.3d 833, 843-44 (10th Cir. 2008) (plaintiff's APA challenge to Interior's decision to take land into trust for Indian tribe was barred by Quiet Title Act when land was already held in trust). However, because the Court finds that plaintiff lacks prudential standing, the Court need not, and does not, reach that issue in this opinion.

[13] Plaintiff also filed a motion for summary judgment [Dkt. #52] following his motions for preliminary injunctive relief. The parties also filed a joint motion for the Court to delay consideration of the emergency injunctive relief until after the

RICHARD J. LEON
United States District Judge

United States Supreme Court ruled on MichGO's petition for writ of certiorari. The Court will deny these motions as moot.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5324 **September Term 2010**

1:08-cv-01331-RJL

Filed On: March 28, 2011

David Patchak,

Appellant

v.

Kenneth Lee Salazar, in his official capacity as Secretary of the United States Department of the Interior, et al.,

Appellees

BEFORE: Henderson and Griffith, Circuit Judges, and Randolph, Senior Circuit Judge

ORDER

Upon consideration of the petitions of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' and the Federal appellees for panel rehearing filed on March 7, 2011, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5324 **September Term 2010**

1:08-cv-01331-RJL

Filed On: March 28, 2011

David Patchak,

Appellant

v.

Kenneth Lee Salazar, in his official capacity as Secretary of the United States Department of the Interior, et al.,

Appellees

BEFORE: Sentelle, Chief Judge; Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges; and Randolph, Senior Circuit Judge

ORDER

Upon consideration of the petitions of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and the Federal appellees for rehearing en banc, and the absence of a request by any member of

the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

CONSTITUTION OF THE UNITED STATES

ARTICLE III, SECTION 2, CLAUSE 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code

Title 28. Judiciary and Judicial Procedure

Part VI. Particular Proceedings

Chapter 161. United States as Party Generally

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346 (f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as

determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to

such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

United States Code

Title 5. Government Organization and Employees

Part I. The Agencies Generally

Chapter 7. Judicial Review

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

United States Code

Title 25. Indians

Chapter 14. Miscellaneous

Subchapter V. Protection of Indians and Conservation of Resources.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

OPPOSITION BRIEF

RECEIVED
AND
BRIEFS

Nos. 11-246 & 11-247

IN THE

Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR RESPONDENT DAVID PATCHAK IN OPPOSITION

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QUESTIONS PRESENTED

1. A plaintiff may bring suit under the Quiet Title Act ("QTA") "to adjudicate a disputed title to real property in which the United States claims an interest" if the plaintiff asserts a claim to a "right, title, or interest . . . in the real property." 28 U.S.C. § 2409a(d). Does the QTA's reservation of federal sovereign immunity for suits concerning "trust or restricted Indian lands" impliedly bar suits challenging agency action under the APA that could not be brought under the QTA because the plaintiff is not seeking to quiet title to the land in question?

2. Section 465 of the Indian Reorganization Act and its implementing regulations limit the Secretary of the Interior's discretion in deciding whether to take land into trust for an Indian tribe. Does a plaintiff living in a community affected by the Secretary's land-in-trust decision fall within the zone of interests protected by that provision and thus have prudential standing to enforce that limitation?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion is reported at 632 F.3d 702. DOI Pet. App. 1a. The opinion of the United States District Court for the District of Columbia is reported at 646 F. Supp. 2d 72. *Id.* at 27a.

JURISDICTION

The district court had jurisdiction over respondent's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals entered judgment on January 21, 2011, and on March 28, 2011, denied petitions for rehearing en banc. The petitions were timely filed by August 25, 2011, the deadline after the Chief Justice granted extensions to the time in which to file petitions for a writ of certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

1. The Match-E-Be-Nash-She-Wish Band of the Pottawatomi Indians, commonly known as the Gun Lake Band, was not federally recognized when Congress enacted the Indian Reorganization Act ("IRA") in 1934. Proposed Finding for Federal Acknowledgement of the Gun Lake Band, 62 Fed. Reg. 38,113, 38,113 (June 23, 1997). For nearly 100 years before the IRA's enactment, the Band affirmatively avoided the jurisdiction of the United States. This history is significant because in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), this Court held that the IRA allows the Department of the Interior ("DOI") to take land into trust only for "those tribes that were under

the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 1068.

In 1839, the Band placed itself under the protection of an Episcopalian mission to avoid the federal government's plan to move Indians west, and occupied lands in Allegan County, Michigan. Fee-to-Trust Appl., p. 4, COA JA 894. In 1855, the Episcopalian bishop declared that he held lands in trust for the Band. *Id.* at 895. Also in 1855, the Pottawatomi signed the Treaty of Detroit, which required Band members to reside in Oceana County, Michigan, and a majority of the Band complied with the treaty by moving to Oceana County. *Id.* But in 1870, the Band violated the treaty by returning to Allegan County, Michigan, thereby breaking off the Band's relationship with the federal government. Formal DOI Technical Assistance Letter from Joann Sebastian Moore, Director of Office of Tribal Services, to D.K. Sprague, Gun Lake Band, p. 2 (May 5, 1995), Exhibit A to Patchak's COA Appellant's Br. [hereinafter "DOI Technical Assistance Letter"]. As the DOI has previously determined, "[s]ince 1870, the Federal government has dealt with band members as individual Indians entitled to attendance at BIA schools, etc., but *has not dealt with the band as an entity*." *Id.* (emphasis added).

2. In 1993, the Band filed an application for federal recognition under 25 C.F.R. § 83.7, a section that applies only to tribes that are not acknowledged or recognized by the federal government at the time of application. The filing therefore acknowledged that the Band lacked federal recognition before 1993. See also Gun Lake Band COA Br., p. 3, COA JA 94 ("[T]he federal government withheld formal acknowledgement beginning in 1870. . . . Thus, for well

over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue commercial self-determination and self-sufficiency."). Before this Court's decision in *Carcieri*, the federal government also acknowledged the Band's lack of federal recognition. Decl. of George T. Skibine, Acting Deputy Assistant Secretary, Department of Interior, ¶ 8, COA JA 166 (noting that the Gun Lake Band's recognition had been previously terminated).

At the time the Band applied for federal recognition, the Band internally agreed "there would never be casinos in our Tribe," and represented in its constitution that it had "decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring." Fee-to-Trust Appl., p. 79, COA JA 925 (emphasis omitted). The Band received federal recognition in 1998. See Final Determination to Acknowledge the Gun Lake Band, 63 Fed. Reg. 56,936, 56,936 (Oct. 14, 1998).

3. In 2001, the Band applied for land to use for a casino complex. Its application requested that the United States take into trust a 165-acre site in rural Wayland Township (the "Bradley Tract") in Allegan County to enable the Band to construct and operate a casino complex. Trust Appl., COA JA 890. This land was owned by MPM Enterprises LLC, which was in turn owned by Station Casinos and other investors. *Id.*, p. 4, COA JA 878; Station Casinos, Inc., Mar. 31, 2011 Form 10-K at 11–12. In its application, the Band acknowledged that it "was ineligible to organize under the Indian Reorganization Act of 1934." *Id.*, p. 5, COA JA 895. And Band members echoed this concession during the application process: "For

approximately 150 years, my Tribe has suffered due to the United States' government's failure to recognize us as an Indian Tribe." Final EA, Appendix Q, p. 124, COA JA 855.

The environmental assessment conducted during the application process proposed a gambling complex of nearly 200,000 square feet, including almost 99,000 square feet of gaming space, two sit-down restaurants, a café, two fast-food outlets, four retail shops, a sports bar, an entertainment lounge, office space, and parking for more than 3,330 cars, buses, and RVs. Final EA, pp. 2-1, 2-2, COA JA 535, 729. This casino complex, which would be open 24 hours a day, 365 days a year, is expected to draw 3.1 million visitors annually—to a farming community of only 3,000 residents. *Id.*, Appendix H, COA JA 754, 577.

4. Fearing the substantial effect that a ratio of a thousand visitors to every resident would have on their community, members of the local community submitted numerous comments and urged DOI to reject the application. *Id.*, Appendix P, COA JA 779, 788. The final environmental assessment confirmed these concerns, noting that traffic during peak hours would be 1,110 cars per hour in this farming community. *Id.* p. 4-6, COA JA 623. But the DOI made a final agency determination on April 18, 2005, that it would acquire the Bradley Tract in trust for the Band. Notice of Final Agency Determination, 70 Fed. Reg. 25,596, 25,596 (May 13, 2005). The notice of determination stated that, in accordance with 25 C.F.R. Part 151.12(b), an IRA regulation, DOI was giving notice to the public "at least 30 days prior to the signatory acceptance of the land into trust." *Id.*

A nonprofit organization of concerned citizens, called Michigan Gambling Opposition ("MichGO"),

filed a complaint within 30 days of the notice and challenged the DOI's right to take the Bradley Tract into trust on a number of grounds, including failure to comply with the National Environmental Policy Act ("NEPA"), the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and the IRA. MichGO's IRA claim alleged a violation of the non-delegation doctrine. Because MichGO filed suit well before the Court's decision in *Carcieri*, MichGO did not assert that the DOI could not take land into trust because the Band was not federally recognized in 1934. And the courts refused to consider that issue in the MichGO litigation.

5. The MichGO litigation resulted in a stay that prevented the DOI from taking the land into trust. On August 1, 2008, during the stay and before the DOI took the land into trust, David Patchak filed this suit against the DOI. Patchak sought review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 706, of the DOI's final agency decision. Relying on *Carcieri*, he argued that the DOI lacked the authority to take the land into trust because the Gun Lake Band was not under federal jurisdiction in 1934.

Patchak, who lives near the Bradley Tract, moved to the area "because of its unique rural setting," and he "values the quiet life he leads in Wayland Township." Compl. ¶ 9, COA JA 12. The planned construction and operation of a casino complex, which would bring 3.1 million visitors annually to a community of 3,000 residents, would destroy that quiet lifestyle. *Id.*; *see* Final EA, ch. 3, p. 3-29, COA JA 577, 754. He anticipates the following adverse effects:

> (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical services; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino. [Compl. ¶ 9, COA JA 12.]

6. The stay in the MichGO litigation expired when the Court denied MichGO's petition for a writ of certiorari. Accordingly, Patchak moved for a stay to prevent the DOI from taking the land into trust. The district court denied Patchak's motion. The DOI took the land into trust five months after Patchak initiated this litigation. The government asserted that by taking the land into trust while Patchak's suit was pending, sovereign immunity under the Quiet Title Act sprang up. Thus, the DOI asserted that the DOI's action deprived the court of jurisdiction.

7. The district court dismissed Patchak's complaint on the theory that Patchak lacked prudential standing because he was not within the IRA's zone of interests. DOI Pet. App. 37a. Although acknowledging that the zone-of-interests test is "'not meant to be especially demanding,'" and that "it only excludes plaintiffs whose interests are so marginally related to or inconsistent with the purposes implicit in the

statute that it cannot be reasonably assumed that Congress intended to permit the suit," *id.* at 33a (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987)), the trial court concluded Patchak fell outside that zone because he was "not an Indian" and did not "seek to protect or vindicate the interests of any Indians or Indian tribes." *Id.* at 35a. The district court explicitly stated that "because the Court finds that plaintiff lacks prudential standing, the Court need not, and does not, reach [the Quiet Title Act] issue in this opinion." *Id.* at 37a n.12.

8. The D.C. Circuit reversed. DOI Pet. App. 22a. Emphasizing this Court's guidance concerning the APA's "generous review provisions," the "drive for enlarging the category of aggrieved persons," and that "the test is not especially demanding," *id.* at 5a (quotations and citations omitted), the court of appeals recognized that Patchak falls within the zone of interests protected by the IRA. "The IRA provisions interpreted in [*Carcieri*] limit the Secretary's trust authority." *Id.* at 7a. "When that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected." *Id.* The court of appeals noted that "[t]he Interior Department itself recognizes the interests of individuals like Patchak who live close to proposed Indian gaming establishments," as evidenced by the fact that DOI regulations allow "'affected members of the public' thirty days to seek judicial review before the Secretary takes land into trust for an Indian tribe," and that "[o]ther regulations require the Secretary to consider the purpose for which the land will be used and whether taking a tribe's land into trust would give rise to 'potential

conflicts of land use.'" *Id.* at 8a–9a (citing 25 C.F.R. §§ 151.12(b) & 151.10(c), (f)). The D.C. Circuit also observed that "[t]he zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 10a (quoting *Clarke*, 479 U.S. at 399). Unlike that type of marginal litigant, Patchak's "stake in opposing the Band's casino is intense and obvious," and it would be "very strange to deny Patchak standing in this case." *Id.*

The D.C. Circuit also rejected the government's assertion that Patchak brought a Quiet Title Act case and that because his APA claim related to land taken in trust for Indians, his claim was barred by sovereign immunity. *Id.* at 21a. The court of appeals noted that the "common feature of quiet title actions is missing from this case": Patchak is not trying to "'establish a plaintiff's title to land,'" as "he mounts no claim of ownership of the Bradley Tract." *Id.* at 14a. Focusing on the statutory text, the court observed that "the language of § 2409a firmly indicates that Congress intended to enact legislation building upon the traditional concept of an action to quiet title." *Id.* at 14a–15a. Section 2409a of the Quiet Title Act requires the plaintiff to "'set forth with particularity the nature of *the right, title, or interest which the plaintiff claims in the real property.*'" *Id.* at 15a (quoting 28 U.S.C. § 2409a(d)) (emphasis added). Further, Section 2409a(b) allows the government the option of retaining possession of the land if it loses the quiet title action, "so long as the government pays just compensation to the person entitled to the property." *Id.* at 16a. This just-compensation provi-

sion "is senseless unless there is someone else—the plaintiff—claiming ownership." *Id.* Accordingly, the D.C. Circuit refused to follow other courts that have "extended the reach of the Quiet Title Act beyond its text" and held that "the terms of the Quiet Title Act do not cover Patchak's suit" and that "[h]is action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA." *Id.* at 21a.

The Court of Appeals noted that Patchak had argued that because he filed suit before the Bradley Tract was taken into trust, even if the Quiet Title Act applied, sovereign immunity did not bar his claim. The Court of Appeals chose not to address the issue in light of its determination that the Quiet Title Act did not apply to Patchak's claim in the first instance. *Id.* at 21a n.10.

9. After the Court of Appeals issued its decision permitting Patchak's challenge to the legality of the DOI's land-in-trust decision to proceed, the Band opened a sprawling casino complex on the Bradley Tract. As Patchak predicted, the casino has severely disrupted the rural character of the area. Media reports indicated that after opening, the parking lots at the casino were "so full and traffic is so heavy along US 131 [that police] closed the northbound and southbound exits" to the highway. Appellant's Resp. to Band's Mot. to Stay the Mandate, Exs. A, B. And police calls in the area have, as expected, "skyrocketed," doubling from historical levels in the first month of operations and tripling in the second month. Grand Rapids Press article, Apr. 9, 2011, *available at* http://www.mlive.com/news/grandrapids/index.ssf/2011/04/why_township_officials_arent_c.html ("It's been like dropping a small city into the middle of that area."). The casino complex

has thus already disrupted the rural lifestyle of Wayland Township; the inevitable result of bringing millions of annual visitors into a farming community of only 3,000 residents.

ARGUMENT

The petitioners contend that the APA's waiver of sovereign immunity is barred by the Quiet Title Act, even though Patchak is not bringing and cannot bring a quiet-title action. They also contend that Patchak does not fall within the zone of interests protected by § 465 of the IRA, even though he is seeking to enforce the limitation § 465 imposes under *Carcieri*, and even though the DOI itself considers interests like his when deciding whether to take land into trust under § 465. The court of appeals correctly rejected both contentions. No further review is warranted, especially given the interlocutory nature of the sovereign-immunity decision and the lack of any split among the circuits on the prudential-standing issue.

I. The Court should decline to address this interlocutory appeal

The D.C. Circuit's decision concluding that sovereign immunity did not bar Patchak's suit is interlocutory. This Court generally declines to exercise its certiorari jurisdiction to review interlocutory decisions. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see also *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) ("this Court above all other must limit its review of interlocutory orders"); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the

litigation), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review granted after final judgment).

The Court should decline review here for two reasons. First, although *state* sovereign immunity is a right not to be sued, and so a right that may in some circumstances warrant protection even at the interlocutory stage, most of the federal circuits that have addressed the issue have recognized that *federal* sovereign immunity is merely a right not to pay damages—that is, a right that can be fully vindicated after judgment.

Second, a decision by this Court reversing the D.C. Circuit would not finally resolve the sovereign-immunity issue in this case. There is a second, independent reason that sovereign immunity does not apply that would need to be addressed on remand: Patchak sued before the government took the land into trust, and the APA waiver of sovereign immunity existing when he filed his complaint controls. Because reversing the Court of Appeals' decision on sovereign immunity likely would not change the outcome in this case, this case is an inadequate vehicle for this Court's review.

A. Because federal sovereign immunity is not a right to avoid trial, it can be vindicated after final judgment

As several federal courts of appeals have recognized, "it is difficult to speak of federal sovereign immunity as a 'right not to be sued.'" *Pullman Const. Indus., Inc.* v. *United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (Easterbrook, J.). "[I]t is quite unlike the eleventh amendment, which provides that '[t]he judicial power of the United States shall not be construed to extend' to suits against states, and the

Foreign Sovereign Immunity Act (FSIA), which gives foreign governments 'immunity from the jurisdiction' of our courts." *Id.* (citation omitted). For example, "[n]o one could argue with a straight face that the United States has, or ever had, a general 'right not to be sued' concerning taxes." *Id.* at 1169. Indeed, "the United States is no stranger to litigation in its own courts," given that "the United States Code is riddled with statutes authorizing relief against the United States and its agencies," including the fact that "Congress has consented to litigation in federal courts seeking equitable relief against the United States." *Id.* at 1168 (citing, for the last point, 5 U.S.C. § 702); see also S. Rep. 996, 94th Cong., 2d Sess. 4 (1976) (*Senate Report*) (legislative history to § 702 of the APA stating that "[f]or years almost every regulatory statute enacted by Congress has contained provisions authorizing Federal courts to review the legality of administrative action that has adversely affected private citizens"). Instead, "[f]ederal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it."[1] *Pullman*, 23 F.3d at 1168.

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[1] The Seventh Circuit noted that this Court had previously described federal sovereign immunity in dicta as a right not to be sued. *Pullman*, 23 F.3d at 1168. But those statements were dicta because, "in the entire existence of the United States, the federal government has never before taken an interlocutory appeal to assert sovereign immunity." *Id.* So although this Court may have made such statements in passing, it has not resolved the issue, and in fact has held that the collateral-order doctrine does not apply to all claims of "immunity." *Id.* at 1169 (citing *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988)); cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) ("Courts, including this Court,

[Footnote continued on next page]

Other courts of appeals that have considered the issue in the civil context have reached the same conclusion, including the Ninth Circuit in a case brought under the Quiet Title Act. *State of Alaska* v. *United States*, 64 F.3d 1352, 1355 (9th Cir. 1995) ("We hold that, despite the label 'immunity,' federal sovereign immunity is not best characterized as a 'right not to stand trial altogether.' . . . Like immunity from service of process (leading to lack of personal jurisdiction), federal sovereign immunity is better viewed as a right not to be subject to a binding judgment. Such a right may be vindicated effectively after trial."); *Houston Cmty. Hosp.* v. *Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265, 280 (5th Cir. 2007) ("'[T]he only portion of the United States' original immunity from suit that Congress continues to assert is a right not to pay damages.'" (quoting *Pullman*)). Although the D.C. Circuit disagreed with these other circuits on the scope of federal sovereign immunity, it did so outside the civil context, observing that it was "far from clear that Congress has waived federal sovereign immunity *in the context of criminal contempt*." *In re Sealed Case No. 99-3091*, 192 F.3d 995, 999 (D.C. Cir. 1999) (emphasis added); see also *Houston Cmty. Hosp.*, 481 F.3d at 279 (noting that the D.C. Circuit reached its conclusion "under circumstances too distinguishable to create a circuit split"); compare *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d

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it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court. 'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'").

169, 192 (2d Cir. 2008) (distinguishing *Pullman* based on specific statutory language addressing discretionary-function immunity).

In short, federal sovereign immunity, unlike Eleventh Amendment immunity, is not a right to avoid suit. It is a defense that can be vindicated effectively after trial. See *State of Alaska*, 64 F.3d at 1357 ("The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States that is qualitatively different from, or weightier than, the hardship imposed by the denial of such defenses as the statute of limitations or *res judicata*, both of which have been held to be effectively reviewable following trial.").

B. The existence of a second, independent sovereign-immunity issue means that a reversal would not resolve sovereign immunity in this case

This Court should also decline to grant review to decide the sovereign-immunity question presented because even if this Court were to reverse on that question, the Court's decision would not finally resolve the issue of sovereign immunity in this case. There is a second sovereign-immunity issue—the "time-of-filing issue"—that the court of appeals did not reach: "we do not address whether sovereign immunity should be determined as of the date his complaint was filed [on August 1, 2008] rather than after the Secretary took the land into trust [on January 30, 2009]." DOI Pet. App. 21a n.10. In other words, if this Court reverses and concludes that the Quiet Title Act applies, the United States will still have to address the separate argument that the Quiet Title Act's assertion of sovereign immunity does not apply

to suits filed before the land is taken into trust by the government. Therefore, this case is interlocutory with respect to the sovereign-immunity issue itself.

In the APA, Congress decided to waive sovereign immunity over suits challenging final agency actions. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ."). Relying on that waiver, Patchak filed his complaint after the final agency determination and before the government took the land into trust under the IRA—in other words, in the window the government specifically created for judicial review.[2] Having waived its sovereign immunity for suits brought within that window, the government cannot at a later date reassert a right that it previously waived. Indeed, the finality of waiver—that it "eliminate[es]" the right—has led this Court to find a "waiver of the Federal Government's sovereign immunity" only if it is "unequivocally expressed in the statutory text." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (describing waiver as "'elimination of sovereign immunity'"); see also *Senate Report* 2, 5, 24, 25 (explaining that the statute will "eliminate[e]" sovereign immunity).

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[2] The DOI regulation's notice requirement imposes a floor, not a ceiling. It requires that the notice state that the DOI will acquire title "no sooner than 30 days after the notice is published." 25 C.F.R. § 151.12(b).

The Ninth Circuit considered a similar issue in *Bank of Hemet* v. *United States*, 643 F.2d 661 (9th Cir. 1981), and held that the United States could not retract—or un-waive—a waiver of sovereign immunity. In *Hemet*, the bank filed its complaint containing a quiet-title claim on January 4, 1978. At the time the bank filed its complaint, the government claimed title to the disputed property, and so the Quiet Title Act's waiver provision, 28 U.S.C. § 2409a, applied.[3] *Id.* at 665. Despite this waiver, the government sold the property several weeks later (on January 30, 1978), before service of the complaint was effected, and thereafter argued that the waiver did not apply because the government had divested itself of its interest in the property. *Id.* at 664. The Ninth Circuit, noting that the government had notice of the complaint before selling the property, rejected the government's attempt to divest the court of jurisdiction: "We hold that under the circumstances of this case the presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed." *Id.* at 665. A contrary holding, the court of appeals recognized, would allow "the government to manipulate its position subsequent to the filing of the complaint so as to present a situation that falls between the cracks of applicable waiver statutes." *Id.*; see also *Delta Sav. & Loan Ass'n, Inc.* v. *IRS*, 847 F.2d 248, 249 n.1 (5th Cir. 1988) (following *Bank of Hemet*).

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[3] The exception in the Quiet Title Act for "trust or restricted Indian lands" at issue in Patchak's case was not implicated in *Hemet*.

Below, the government contended that it was not manipulating jurisdiction by its position, even though its time-of-filing theory would allow it to evade Congress's waiver of sovereign immunity in the APA for almost every instance where the government took land into trust for an Indian tribe. Under the government's theory, a plaintiff seeking to quiet title who filed suit under the APA before the government took the land into trust and after the agency's final determination would initially be allowed to bring his suit because Congress waived sovereign immunity via the APA. But once the act he was seeking to prevent occurred—that is, once the government took land into trust—the Quiet Title Act would automatically bar his suit from continuing (assuming the government is right that it can waive sovereign immunity and then later rescind its waiver). See *Dep't of Interior* v. *South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting from decision to grant, vacate, and remand) ("The Solicitor General now represents to us that it is the position of the Department of the Interior, as well as that of the Department of Justice, that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action will continue to be barred by the QTA after the United States formally acquires title."). The government's approach, in other words, holds out to citizens the opportunity to bring a suit to challenge the DOI's decision to take land into trust but then, like Lucy holding a football for Charlie Brown, pulls away the opportunity once the suit commences.

Other circuits have disagreed with the Ninth Circuit's decision in *Hemet* and have held (in the context of Eleventh Amendment immunity) that "a State may alter the conditions of waiver and apply

those changes to torpedo even pending litigation." *Maysonet-Robles* v. *Cabrero*, 323 F.3d 43, 52 (1st Cir. 2003); see also *Iowa Tribe of Kansas & Nebraska* v. *Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010); but see 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 105.21[4] ("The Ninth Circuit has the far better of the argument."). These circuits relied on *Beers* v. *State*, 61 U.S. 527 (1857), where this Court, in the context of state sovereign immunity, said that a sovereign "may withdraw its consent whenever it may suppose that justice to the public requires it." *Id.* at 529. But the government cannot contend that "justice to the public" requires withdrawing its waiver under these circumstances.

First, Congress has indicated, through the APA's waiver, that justice requires that parties aggrieved by an agency action should be allowed judicial review. That is why Congress waived sovereign immunity under the APA in the first place. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); see also *Senate Report* 3, 7 (explaining that Congress waived sovereign immunity in the APA to foster "the principles of accountability and responsive Government" and to avoid "'the unnecessary injustice cause by sovereign immunity'").

Second, DOI has specifically recognized the need to protect the interests of the public by allowing for judicial review of its decisions to take land into trust for Indian tribes. Land Acquisitions, 61 Fed. Reg. 18,082, 18,082 (Apr. 24, 1996) (codified at 25 C.F.R. § 151.12) (establishing "a procedure to ensure the opportunity for judicial review of administrative de-

cisions to acquire land in trust for Indian tribes . . . ."). Before adopting 25 C.F.R. § 151.12, the DOI could purportedly avoid judicial review of its land-in-trust decisions by reaching a final determination and immediately taking the land in trust. See *Dep't of Interior*, 519 U.S. at 920 (Scalia, J., dissenting from decision to grant, vacate, and remand). That is why DOI created a window between the final agency determination and the actual taking of the land into trust during which an APA challenge could be brought (as Patchak did here). 25 C.F.R. § 151.12(b); see also Notice of Determination, 70 Fed. Reg. at 25,596 ("The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes . . . before the transfer of title to the property occurs.").

The possibility of judicial review—described by members of this Court as "reviewability-at-the-pleasure-of-the-Secretary," *Dep't of Interior*, 519 U.S. at 920 (Scalia, J., dissenting from decision to grant, vacate, and remand)—is largely illusory if the government can override the APA waiver simply by taking the land into trust. The only way it is not illusory is if the plaintiff files early enough in the 30-day window to have time to persuade a court to issue a stay before the government can take the land into trust. But the possibility that the judiciary may intervene in time to stay the executive's hand does not diminish the unfairness of the government's approach. As one commentator has put it, "The government has the right not to be sued; it does not have the right to induce plaintiffs to invest time, money, and effort in a litigation, only to find that well along in the process, the government has

changed its mind." 16 MOORE'S FEDERAL PRACTICE § 105.21[4].

In any event, the "time of filing" sovereign-immunity issue has not been resolved by the D.C. Circuit or the district court. Thus, unless this Court addresses this so-far unreviewed issue, a decision reversing the court of appeals' decision would not finally resolve the sovereign-immunity issue in this case. This Court should therefore wait for a case that presents the question on which the petitioners seek review without the complication of a second ground to oppose sovereign immunity that could render this Court's decision without effect as to the parties before it.

II. The D.C. Circuit correctly held that the Quiet Title Act's sovereign-immunity bar did not apply because Patchak did not bring a quiet-title claim

As noted above, the APA broadly waives sovereign immunity for challenges to administrative decisions, like the DOI's decision to take land into trust. The APA then limits this waiver, stating that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Petitioners contend that the Quiet Title Act applies to this action and forbids the relief sought. The Quiet Title Act contains a broad waiver of sovereign immunity for quiet-title actions, but carves out land-in-trust decisions for Indian tribes from the general waiver. Although petitioners contend the Quiet Title Act applies to Patchak's claims, the plain language of the Act shows that Patchak has not asserted an action to quiet title. Thus, petitioners are left to argue that the Quiet Title Act impliedly bars

Patchak's suit. But petitioners' argument is illogical. It requires the Quiet Title Act's carve-out preserving sovereign immunity for land taken into trust for Indian tribes to be broader than the Quiet Title Act's waiver of sovereign immunity. The D.C. Circuit correctly reasoned, consistent with this Court's opinions, that "the terms of the Quiet Title Act do not cover Patchak's suit," and "[h]is action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA." DOI Pet. App. 21a.

A. The decision below is consistent with both the Quiet Title Act and this Court's decisions

The Quiet Title Act, as its name suggests, allows plaintiffs to bring quiet-title actions against the government. The D.C. Circuit correctly analyzed the statutory text and concluded its sovereign-immunity rules apply only to suits that could be brought under the Act.

First, the Quiet Title Act waives sovereign immunity by allowing the United States to be named as a party defendant "in a civil action *under this section* to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a) (emphasis added). The exception to waiver that the government contends applies here is also specifically limited to claims brought under § 2409a: "This section does not apply to trust or restricted Indian lands." *Id.*

Second, the Quiet Title Act's pleading requirement spells out what civil actions can be brought under it: "The complaint shall set forth with particularity the nature of the *right, title, or interest which the plaintiff claims* in the real property, [and] the

circumstance under which it was acquired." 28 U.S.C. § 2409a(d) (emphasis added). In other words, civil actions brought under the Act are specifically limited to actions by plaintiffs who—unlike Patchak—are seeking to quiet title in themselves. *See* DOI Pet. App. 14a–15a.

Third, the text of § 2409a(b) provides that the United States may retain possession of the disputed property even if it loses a quiet-title action so long as it makes "payment to the person determined to be entitled thereto of an amount" that the district court determines "to be just compensation" for possession or control of the property. This provision further highlights that actions under this section involve claims of ownership; otherwise there would be no need for "just compensation" or a person "entitled thereto." *See* DOI Pet. App. 16a.

Nothing in this Court's decisions in *Block* v. *North Dakota*, 461 U.S. 273 (1983), or *United States* v. *Mottaz*, 476 U.S. 834 (1986), requires a different outcome. Those cases both involved traditional quiet-title actions—actions by plaintiffs who claimed an ownership interest in property adverse to the United States' claim of title to the property. In *Block*, "the United States and North Dakota assert[ed] competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota." 461 U.S. at 277. North Dakota asserted a traditional quiet-title claim. This is borne out by the holding in *Block*: "We hold that Congress intended the QTA to provide the exclusive means by which *adverse claimants* could challenge the United States' title to real property." *Id.* at 286 (emphasis added). In *Mottaz*, the plaintiff had inherited interests in several parcels on a reservation, and asserted title to

the lands in dispute: "What respondent seeks is a declaration that she alone possesses valid title to her interests in the [parcels of land] and that the title asserted by the United States is defective." 476 U.S. at 842 (holding that the Quiet Title Act's 12-year statute of limitations barred her claim). Thus, both of these cases addressed traditional quiet-title actions. *See* DOI Pet. App. 18a.

The petitioners nevertheless contend that the Quiet Title Act applies and overrides the APA's waiver of sovereign immunity because § 702 does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. But such a prohibition is "not lightly to be inferred." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). "Judicial review of administrative action is the rule, and nonreviewability an exception . . . [which must be shown by] 'clear and convincing evidence of a contrary legislative intent.'" *Id.* at 166–67 (citation omitted).

The government argues that the legislative history of the APA—particularly a letter written by then-Assistant Attorney General Scalia concerning the phrase "expressly or impliedly forbids the relief which is sought"—confirms that the Quiet Title Act impliedly bars suits like Patchak's. DOI Pet. 10–11. But as explained above, Patchak is not bringing suit under the Quiet Title Act. For the carve out preserving sovereign immunity for Indian tribe land-in-trust decisions to impliedly bar Patchak's suit, the carve out must be interpreted to be broader than the Quiet Title Act's waiver of sovereign immunity. Nothing in the statutory text requires this illogical result.

Likewise, the legislative history of the APA undermines the government's argument. The word

"impliedly" was reportedly added to § 702 because the existence of a general sovereign immunity before 1976 meant that pre-1976 statutes (such as the 1972 Quiet Title Act) had no reason to expressly forbid relief against the United States. This in turn meant that "'in most if not all cases where statutory remedies already exist, these remedies will be exclusive.'" *Id.* (citation omitted). The fact that statutory remedies are exclusive reinforces the point that the statutory text governs and that Patchak's suit, which could not be brought under the Quiet Title Act, is not impliedly covered by the Quiet Title Act's immunity provisions. As explained in the legislative history, when the statute Congress has passed "is not addressed to the type of grievance which the plaintiff seeks to assert"—here, Patchak's suit that does not assert a quiet-title claim—"suit would be allowed." *Senate Report* 27. Put another way, this legislative history for § 702 of the APA does not show, as the government would have it, that the Quiet Title Act impliedly bars actions that do *not* qualify as quiet-title actions. Consequently, the D.C. Circuit correctly concluded that the Quiet Title Action does not apply, and that Patchak's action falls within the APA's general waiver.

B. The conflict is new and should be given more time to develop now that a court of appeals has, for the first time, focused on the Quiet Title Act's text

Although other circuits have concluded that the Quiet Title Act impliedly forbids parties from bringing APA suits to challenge the DOI's decision to take land into trust, those decisions are not consistent with the text of the Quiet Title Act. See DOI Pet.

App. 21a ("The courts of appeals mentioned above have extended the reach of the Quiet Title Act beyond its text.").

In *Florida Department of Business Regulation* v. *Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), the Eleventh Circuit—the first circuit to rule on this issue—never addressed § 2409a(d)'s requirement that the plaintiff claim "right, title, or interest . . . in the real property," and even admitted that "technically the suit in the instant case [was] not one to quiet title." *Id.* at 1254. Instead, the Eleventh Circuit based its conclusion on the policies it found underlying the Quiet Title Act, not on the language of the Act. The court of appeals also relied on its belief that under the IRA the DOI had such unlimited discretion to take land into trust for a tribe that any decision would be essentially unreviewable, *id.* at 1256–57, failing to note the temporal limit that *Carcieri* recognizes as limiting the DOI's discretion—that only tribes under federal jurisdiction in 1934 are eligible to have land taken into trust for them. The Ninth Circuit's decision in *Metropolitan Water District of Southern California* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub. nom. California* v. *United States*, 490 U.S. 920 (1989), also never addressed § 2409a(d)'s statutory requirement that the plaintiff be an adverse claimant and instead focused simply on a policy argument, citing *Florida Department of Business Development*. *Id.* at 143–44. The Tenth Circuit also tracked the Eleventh Circuit's policy-based analysis. *Neighbors for Rational Dev.* v. *Norton*, 379 F.3d 956, 962 (10th Cir. 2004) (discussing *Florida Department of Business Development*). And although the Tenth Circuit at least mentioned the pleading requirements of § 2409a(d), it mentioned them only to say that

"plaintiffs cannot circumvent the intent of the Quiet Title Act's limitations with artful pleading." *Id.* at 965. But ignoring the Act's express pleading limitations, as the Tenth Circuit did, is not the way to effectuate those limitations.

This circuit split is new, created by the D.C. Circuit's decision. Now that a circuit has reached a decision based on the text of the Quiet Title Act and not underlying policy considerations, this Court should allow more time for other circuits to address the issue and weigh the competing arguments. Furthermore, to the extent that national uniformity is important, petitioners themselves admit that uniformity can be achieved by the fact that APA suits can be brought in the D.C. Circuit. DOI Pet. 16. In short, because the D.C. Circuit is correct and can provide uniformity on this issue, there is no need for this Court's review.

Beyond that, the government's arguments about the adverse consequences of this decision are overstated. The government suggests that under the D.C. Circuit's decision, all land-in-trust decisions are forever subject to attack. First of all, Patchak sued *before* the land was taken into trust; his suit does not raise the specter of *post hoc* attacks initiated years after the land was taken into trust. Second, actions challenging taking land into trust are subject to traditional defenses including the APA's own statute of limitations. See 28 U.S.C. § 2401(a); cf. *Delano Farms Co.* v. *Cal. Table Grape Comm'n*, 655 F.3d 1337, 1350 (Fed. Cir. 2011).

The government further argues that the decision will "severely disrupt the Secretary's acquisition of trust lands for Indians" because "[a]ny plaintiff seeking to sue the Secretary can obtain venue in the

United States District Court for the District of Columbia, 28 U.S.C. 1391(e), and in light of the decision below, there is little reason for a plaintiff to bring a case anywhere else." DOI Pet. 16. Ten months have passed since the D.C. Circuit issued its opinion, but no new cases have been filed against the Secretary of the Interior relating to lands already held in trust for Indian tribes. Moreover, the very incentive the government claims was created by the D.C. Circuit's decision has existed for 35 years without the disruption the government fears.

In 1978, the District Court for the District of Columbia addressed the situation where, as here, a plaintiff brought suit under § 702 of the APA to challenge the DOI's decision to take land into trust for an Indian tribe, arguing that the Sault Ste. Marie tribe was not a tribe within the meaning of the Quiet Title Act. *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978). The district court, noting that § 2409a of the Quiet Title Act requires a plaintiff "to state with particularity the nature of the right, claim, or interest plaintiff possesses in the property at issue," rejected the government's claim that the Quiet Title Act's sovereign-immunity provision barred the suit. *Id.* at 471. As the court explained, because "plaintiffs do not possess the type of property right which would be necessary for the maintenance of a quiet title action, it is clear that 28 U.S.C. [§] 2409a is inapplicable to this suit, and may not, therefore, force dismissal of this suit due to the doctrine of sovereign immunity." *Id.* at 472. In other words, for the last 35 years plaintiffs have had the exact incentive that the government claims now causes a significant adverse consequence. Plaintiffs have continued to bring suits elsewhere, as evidenced by the decisions cited as creating a circuit

split—a 1985 decision by the Eleventh Circuit, a 1987 decision by the Ninth Circuit, and a 2004 decision by the Tenth Circuit.

This issue does not warrant the Court's review at this time.

III. The prudential-standing decision does not conflict with this Court's decisions, implicate a circuit split, or warrant this Court's review

The petitioners contend that Patchak falls outside the zone of interests arguably protected by § 465 of the IRA, the provision on which Patchak based his suit, because Patchak's asserted injuries focus on the use the land will be put to, rather than some other harm from the DOI's decision to take land into trust. But as the D.C. Circuit explained, § 465 covers interests like Patchak's.

For one, Patchak did not need to show that § 465 of the IRA was meant to benefit those in his situation. In *National Credit Union Administration* v. *First National Bank & Trust Co.*, 522 U.S. 479 (1998), the Court explained that it does "not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff." *Id.* at 492. Instead the Court "first discern[s] the interests 'arguably to be protected' by the statutory provision at issue," and "then inquire[s] whether the plaintiff's interests affected by the agency action in question are among them." *Id.* For another, the zone-of-interests test also includes within its scope those who can be expected to challenge a provision. *Clarke*, 479 U.S. at 398 ("The essential inquiry is whether Congress 'intended for [a particular] class

[of plaintiffs] to be relied upon to challenge agency disregard of the law.'").

In *Carcieri*, the Court interpreted § 465 and § 467 to limit the DOI's discretion to take land into trust for Indians. 129 S. Ct. at 1064–66. The fact that the statute limits the DOI's discretion demonstrates that § 465 at least arguably exists to protect the interests of the community that would be affected if the land were taken into trust, for members of the community make up part of the class that can be relied upon to challenge land-in-trust decisions.

This interpretation is supported by the DOI's own regulations under § 465 of the IRA, which specifically require the Secretary to consider both "[t]he purposes for which the land will be used" and "potential conflicts of land use" when deciding whether to take land into trust. 25 C.F.R. § 151.10(c), (f). And the DOI further recognizes that its decision to take the land into trust affects the surrounding community—i.e., people like Patchak—by providing "affected members of the public" with notice before the land is taken into trust so that they can seek judicial review under the APA. Land Acquisitions, 61 Fed. Reg. 18,082; 25 C.F.R. § 151.12(b). The government says nothing in its petition to explain why the DOI thinks land use is directly relevant under these regulations promulgated under § 465 yet not an interest even "arguably within the zone of interests to be protected" by the APA's "generous review provisions." *Clarke*, 479 U.S. at 395–96.

Not only is the decision below consistent with this Court's decisions, it does not conflict with the decisions of other circuits. The first evidence of this is that the government does not allege a circuit split on the prudential-standing issue. DOI Pet. at 18–23.

And all of the cases the Band cites are distinguishable. For example, the Eighth Circuit in *Rosebud Sioux Tribe* v. *McDivitt*, 286 F.3d 1031 (8th Cir. 2002), relied on statutes that the court of appeals thought were "intended to protect only Native American interests." *Id.* at 1036–37. Here, however, this Court has recognized that § 465 of the IRA is intended to be a limitation on the government's ability to take land into trust for Indians. *Carcieri*, 129 S. Ct. at 1067 n.7 ("[W]e conclude that the language of § 465 unambiguously precludes the Secretary's action with respect to the parcel of land at issue in this case."). The Sixth and Seventh Circuit decisions the Band relies on addressed situations where the interest asserted was "at odds with the concerns of the provision in issue," *Jonida Trucking, Inc.* v. *Hunt*, 124 F.3d 739, 742 (6th Cir. 1997), or "inconsistent" with the relevant provisions, *Courtney* v. *Smith*, 297 F.3d 455, 464, 466 (6th Cir. 2002); *Am. Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d 460, 471 (7th Cir. 1999). But again, § 465 imposes a limitation on the Secretary, and Patchak's suit seeking to enforce that limitation is consistent with the purposes of the statute.

In short, the Secretary's own procedures for taking land into trust under § 465 acknowledge that placing the land in trust affects the interests of the surrounding community. The D.C. Circuit's recognition that Patchak is arguably within that zone of interests was correct, consistent with the decisions of this Court, and consistent with the decisions of its sister circuits. The prudential-standing issue also does not warrant this Court's review.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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November 9, 2011

REPLY BRIEF

No. 11-246

In The
Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In The
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No. 11-246

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
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DAVID PATCHAK, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals' Quiet Title Act holding squarely conflicts with the law of four other circuits. Respondent admits that. Opp. 24-28. And for good reason: the competing circuit decisions and their construction of the Quiet Title Act, 28 U.S.C. § 2409a, are irreconcilable. *See* Pet. 9-15; U.S. Pet. at 15-16, *Salazar v. Patchak*, No. 11-247 ("U.S. Pet."). Respondent's only answer is that, because future plaintiffs can all choose to take their cases into the D.C. Circuit, a de facto "uniformity on this issue" will eventually be forced on the United States government and other affected parties. Opp. 26.

The uniformity in federal law that this Court's certiorari jurisdiction enforces, however, is the genuine consistency in the substantive content of federal law that is accomplished by the adoption of a single, considered, and controlling rule of law. Respondent's prognostication (Opp. 26) that forum-shopping litigants will circumvent all contrary circuit law by filing suit in the D.C. Circuit is a prescription for jurisdictional overbearing by plaintiffs, not for obtaining "uniformity" in conflicting circuit law. The sovereign immunity of the United States Government from suit and the vital need for stability in the title of land on the part of local governments, tribes, and businesses deserve a genuinely settled construction of the law that is grounded in legal reasoning, not procedural traps. *See, e.g.*, Amicus Brief of Wayland Township, *et al.*, 7-8; Pet. 21.

Respondent's other efforts to fend off this Court's review fare no better. The contention that the United States' sovereign immunity is a second-class protection that does not immunize the federal government from suit or warrant interlocutory review is just wrong, defying on-point precedent from this Court holding the opposite and granting the same prompt review that is warranted here.

Respondent's invocation of the time-of-filing rule is no help either. Assuming that rule derived from diversity jurisdiction cases applies to federal question cases at all, it would do so only if consistent with the relevant statutory text. The argument thus involves a subsidiary statutory construction issue that would arise after, and only after, resolution of the threshold jurisdictional question presented here. Beyond that, the merits of the court of appeals' Quiet Title Act

holding, its impact on the sovereign immunity of the United States, and the funneling of future Quiet Title Act litigation into the D.C. Circuit (the same funneling that respondent applauds in trying to downplay the circuit conflict) is unaffected by and completely independent of that argument.

With respect to the question of prudential standing, respondent has no substantive answer to the conflict in the circuits' decisional law. He completely ignores the conflict between the court's decision here relying on a statute other than the one sued upon to supply the interest for prudential standing, and the Federal Circuit's opposite holding that only an interest protected by the statute that is the "gravamen" of the complaint suffices. *See* Pet. 32-33. He also makes no effort to defend—nor could he, Pet. 22-31—the court of appeals' holding that a plaintiff's interest in "polic[ing]" compliance with federal law (Pet. App. 6a) supports prudential standing.

Finally, respondent's attempt to brush off the contrary law of the Fifth, Sixth, Seventh, and Eighth Circuits backfires as he admits that those circuits deny prudential standing when the plaintiff's interests are "'at odds with the concerns of the provision in issue.'" Opp. 30 (quoting *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 742 (6th Cir. 1997)). That is this case.

I. THE CONFLICT IN THE CIRCUITS ON THE QUIET TITLE ACT'S SCOPE IS ADMITTED, RECURRING, AND CAN BE RESOLVED ONLY BY THIS COURT

Twice this Court has held that the Quiet Title Act is "the exclusive means by which adverse claimants could challenge the United States' title to real property." *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *see Block v. North Dakota*, 461 U.S. 273, 286 (1983).

The D.C. Circuit disagrees. The court held here that the Quiet Title Act is just one option; the Administrative Procedure Act also allows plaintiffs to challenge the United States' title as long as those plaintiffs do not themselves claim title to the property. Pet. App. 20a-24a. In so holding, the D.C. Circuit openly acknowledged (Pet. App. 20a) that its decision squarely conflicts with the law of the Ninth, Tenth, and Eleventh Circuits. Each of those courts has specifically rejected the argument that the Quiet Title Act and its reservations of immunity apply only to those asserting their own title to land held by the United States. *See Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004); *Metropolitan Water Dist. v. United States*, 830 F.2d 139, 143-144 (9th Cir. 1987), *aff'd by equally divided Court, sub nom. California v. United States*, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation v. United States Dep't of Interior*, 768 F.2d 1248, 1251, 1254 (11th Cir. 1985); *see also* Pet. 10-13; U.S. Pet. 15.

The decision also is irreconcilable with the Seventh Circuit's decision in *Shawnee Trail Conservancy v. United States Department of Agriculture*, 222 F.3d 383 (7th Cir. 2000), which held

that the Quiet Title Act continues to apply even "in the context of claims that do not seek to quiet title in the party bringing the action," *id.* at 388. *See also* Pet. 13-14; U.S. Pet. 15-16.

Respondent admits (Opp. 24) that the law of the other circuits squarely conflicts with the court of appeals' decision here, and all of his efforts to deflect the need for this Court's review collapse on themselves.

First, he argues that this Court's review is not needed because "the D.C. Circuit is correct" (Opp. 26). Petitioner, the United States, and four other circuits beg to differ. But, in any event, whether right or wrong, there should be a single federal-law answer in all the federal circuits to the meaning of a federal statute. The United States' sovereign immunity from suit should not turn on and off as plaintiffs cross circuit boundaries.[1]

Second, respondent insists (Opp. 26) that there is no need for this Court to harmonize circuit law because the D.C. Circuit's virtually universal jurisdiction over suits against federal agencies ensures that plaintiffs will now all file suit in the D.C. Circuit and thus will impose their own "uniformity" on the law. But the fact that the law will not develop further and the inter-circuit

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[1] Respondent cites (Opp. 22) the Act's provision that the United States may retain possession of land even if it loses litigation by paying just compensation, 28 U.S.C. § 2409a(b), and argues that the provision supports limiting the trust or restricted lands exception to plaintiffs asserting direct title. Whether that provision helps or hurts respondent on the merits (because it underscores the unlikelihood that Congress intended less-interested plaintiffs to be able to accomplish the very ouster

disagreement cannot be repaired are the very reasons this Court exercises its certiorari jurisdiction, not reasons for avoiding it. And the relevant "uniformity" enforced by this Court's certiorari jurisdiction is the adoption of a single, consistent, substantive meaning for federal law, not a uniform pattern of forum shopping by plaintiffs. *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980) (adoption by this Court of a single rule was necessary to encourage "uniformity in the administration of state law" and to avoid "forum shopping").

Arguing against himself, respondent then contends that plaintiffs will "continue[] to bring suits elsewhere" because they did so for 35 years after one district court ruled that the immunity preserved by the Quiet Title Act applied only to plaintiffs enforcing their own title. Opp. 27-28 (citing *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978)). Of course, such perpetuation of inconsistent results—just as much as the D.C. Circuit's truncation of percolation or correction in the law—merits this Court's certiorari review.

In any event, the whole reason that this Court's certiorari decision focuses on inter-*circuit* conflicts and not contrary trial court decisions by a single judge is that the latter are non-precedential, and thus they are incapable of establishing the type of governing law that permanently alters the outcomes of cases or parties' forum choices. Only rulings from the States' highest courts or from federal circuit

courts—like the five conflicting courts of appeals' decisions here—can do that.[2]

Third, respondent argues (Opp. 11) that the United States' sovereign immunity is a mere shadow of the immunity accorded to States and foreign governments in that it "is merely a right not to pay damages," not a right to avoid suit that merits interlocutory protection. The short answer is that this Court has said otherwise—repeatedly. *See, e.g.*, *Dolan v. United States Postal Serv.*, 546 U.S. 481, 484 (2006) ("'[S]overeign immunity shields the Federal Government and its agencies from suit.'") (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *Mottaz*, 476 U.S. at 841 (Quiet Title Act addresses "[w]hen the United States consents to be sued"); *Block*, 461 U.S. at 280 ("The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity."); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued.").

Indeed, it is precisely because the Quiet Title Act expressly preserves the United States' immunity from suit that this Court has twice granted review in Quiet Title Act cases in precisely the same procedural

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[2] The ineffectiveness of the *Andrus* decision is equally attributable to the fact that, for 26 of respondent's "35 years" (Opp. 27), the decision was backhanded by the courts of appeals that addressed it, *see Florida Dep't of Bus. Regulation*, 768 F.2d at 1255 n.9; *Neighbors for Rational Dev.*, 379 F.3d at 964, and it was ignored by the D.C. Circuit entirely.

posture. *See Mottaz*, 476 U.S. at 840-841; *Malone v. Bowdoin*, 369 U.S. 643, 644-645 (1962). That review reflects, moreover, the critical need for stability embodied in the Quiet Title Act's trust or restricted lands exception, given the extensive reliance of local governments, tribes, and businesses on the reliability of the United States' title. *See, e.g.*, Amicus Brief of Wayland Township, *et al.* at 7-8 ("The court of appeals' decision is causing great disruption to the amici regional governments' ability to develop and implement infrastructure improvements and other initiatives.").

Fourth, and finally, respondent argues (Opp. 14-20) that the time-of-filing rule would preserve his claim even if the Quiet Title Act's bar to suit applied. To begin with, there is a substantial question whether the time-of-filing rule applies outside of the diversity-jurisdiction context at all. *See Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 571 (2004) (time-of-filing rule "measures all challenges to subject-matter jurisdiction *premised upon diversity of citizenship* against the state of facts that existed at the time of filing") (emphasis added); *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008) ("The letter and spirit of the [time-of-filing] rule apply most obviously in diversity cases, where the rule originated * * * and where heightened concerns about forum-shopping and strategic behavior offer special justifications for it.").

But even if it is conceptually capable of extension to federal question jurisdiction cases, its applicability to any given jurisdictional statute is a question of statutory construction. *See United States v. Tohono O'odham Nation*, 131 S. Ct. 1723, 1730 (2011) (courts

are "wrong" to apply time-of-filing rule "to suppress the statute's aims"); *ConnectU*, 522 F.3d at 92 ("[C]ourts have been careful not to import the time-of-filing rule indiscriminately into the federal question realm.") (footnote omitted). Whether the Quiet Title Act admits of a time-of-filing exception thus is a statutory construction question that will not arise unless and until this Court resolves the inter-circuit conflict on the Quiet Title Act's applicability.

And when it does, respondent will lose. The only court of appeals to have addressed whether a time-of-filing rule applies to the Quiet Title Act's trust or restricted lands provision has rejected it. *See Iowa Tribe of Kan. & Neb. v. Sac & Fox Nation*, 607 F.3d 1225, 1232-1237 (10th Cir. 2010) (waiver of immunity existed when plaintiff filed suit to enjoin Secretary from placing Indian lands into trust, but was revoked after placement into trust occurred). That decision, moreover, was rooted in over 150 years of this Court's precedent recognizing that the sovereign—federal or state—can revoke a waiver of immunity after suit is filed. *See, e.g., Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (sovereign has the right to "withdraw its consent whenever it may suppose that justice to the public requires it"); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] State may * * * alter the conditions of its waiver and apply those changes to a pending suit."); *Maricopa County v. Valley Nat'l Bank*, 318 U.S. 357, 362 (1943) ("Such consent, though previously granted, has now been withdrawn. And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."); *Lynch v. United States*, 292 U.S. 571,

581 (1934) (Brandeis, J.) (government could refuse to honor contractual consent to suit because "[t]he consent may be withdrawn, although given after much deliberation and for a pecuniary consideration"); *see also Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 61 n.3 (1944) (Frankfurter, J., dissenting) ("Of course the State can at any time withdraw its consent to be sued.").

In any event, the mere potential of prevailing later on a statutory construction question does nothing to diminish the importance at this juncture of resolving the entrenched five-circuit split on whether the United States' sovereign immunity bars the suit altogether, particularly because the enduring legal and practical impact of the D.C. Circuit's decision is entirely unaffected by that statutory construction question.

II. THE CIRCUITS' LEGAL TESTS FOR PRUDENTIAL STANDING ARE IRRECONCILABLE

Respondent tries to amend rather than defend the D.C. Circuit's prudential standing holding. That court held that respondent's interests under *a different* statute—the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721—positioned him to "police" the Secretary's compliance with the Indian Reorganization Act, 25 U.S.C. § 465. Pet. App. 6a; *see id.* at 8a-9a. That rule for prudential standing cannot be reconciled with the law in the Fifth, Sixth, Seventh, and Eighth Circuits. *See* Pet. 26-30. The Eighth Circuit has specifically held that a plaintiff's "considerable" legal interests do not support prudential standing to nullify the Secretary of Interior's leasing decision on Indian lands where

those interests "conflict with the tribes' interests." *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1037 (8th Cir. 2002); *see also Bonds v. Tandy*, 457 F.3d 409, 414-415 (5th Cir. 2006) (conflicting interest precludes prudential standing).

Similarly, the Sixth and Seventh Circuits have flatly rejected the "policing" approach to prudential standing adopted by the D.C. Circuit here. *See Courtney v. Smith*, 297 F.3d 455, 461, 463-464 (6th Cir. 2002); *American Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 470 (7th Cir. 1999) (substantial employment interest "in a realistic and fair contracting process" insufficient to confer prudential standing).

The D.C. Circuit's decision is also flatly inconsistent with this Court's precedent holding that, to establish prudential standing, the plaintiff must demonstrate that his injury falls within the zone of interests protected by "the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *accord Bennett v. Spear*, 520 U.S. 154, 175-176 (1997) (same). Indeed, in *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1988), this Court held that reliance on even a different provision of the *same law* at issue would be permitted only if there was an "unmistakable link" between the two provisions, *id.* at 494 n.7.

Likewise, respondent has no answer to the irreconcilability of the D.C. Circuit's decision here and the Federal Circuit's decision in *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991), which specifically held that prudential standing

requires that the plaintiff's interest fall within the zone of interests of the statute that is the "gravamen" of the complaint, not another statute, *id.* at 937 (quoting *Lujan*, 497 U.S. at 886).

Understandably, respondent does not even mention the D.C. Circuit's "polic[ing]" rule, let alone try to defend it. Indeed, this Court just last term reaffirmed that standing cannot be predicated on either interests that are "inconsistent with the purposes implicit in the statute," *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 870 (2011) (quotation marks omitted), or a desire to police governmental compliance with the law, *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1441-1442 (2011).

Instead, respondent argues (Opp. 29) that this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), somehow rendered his interests consistent with the purposes of the Indian Reorganization Act. Respondent, however, never explains how a decision *narrowing* the number of a statute's beneficiaries can counterintuitively *expand* the class of people entitled to sue under it.

In any event, that argument simply commits the same legal error under a different label: it collapses the merits and prudential standing inquiries, and arrogates to every private individual eager to file suit the right to enforce a sovereign immunity interest in trust or restricted land that (unlike his gambling opposition) is rooted in the Indian Reorganization Act. Whether that is the right or wrong mode of determining whether prudential standing exists is precisely the question on which the courts of appeals

have adopted conflicting rules, and precisely why this Court's review is needed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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November 21, 2011

AMICUS CURIAE BRIEF

Nos. 11-246 & 11-247

In The Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Petitioner,

v.

DAVID PATCHAK, et al.,

Respondents.

KEN L. SALAZAR, Secretary of the Interior, et al.,

Petitioners,

v.

DAVID PATCHAK, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The National Congress of American Indians ("NCAI") submits this brief as amicus curiae in support of the petitions for a writ of certiorari filed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (No. 11-246) and *Salazar v. Patchak* (No. 11-247).[1] As the oldest and largest national organization addressing American Indian interests, NCAI currently represents more than 250 tribes and Alaska native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of Indian issues, including the federal trust-acquisition authority at issue in this suit.

Amicus is in a unique position to more fully explain to this Court the vital role that trust land acquisitions have played, and continue to play, in the building of stable tribal governments and the development of strong tribal economies. In addition, amicus will show how the D.C. Circuit's decision, if

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[1] In accord with Supreme Court Rule 37.6, NCAI affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of NCAI's intention to file this amicus brief under this Rule, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

allowed to stand, will immediately frustrate and curtail such development.

REASONS FOR GRANTING THE PETITIONS

The petitions present questions of significant importance to the United States and to Indian tribes nationwide. As thoroughly discussed in the petitions, the D.C. Circuit's decision creates an acknowledged circuit conflict with the Ninth, Tenth, and Eleventh Circuits on the scope of the United States' immunity from suit under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. Tribe Pet. 9-15; U.S. Pet. 15-16. In reaching its decision, and in conflict with decisions of this Court, the D.C. Circuit erroneously construed the United States' waiver of sovereign immunity under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. Tribe Pet. 15-19; U.S. Pet. 8-14.

As recognized by both petitions, if not corrected by this Court, the D.C. Circuit's decision will have significant long-term adverse consequences for the United States, tribal governments, state and local governments, as well as communities and businesses. Tribe Pet. 19-21; U.S. Pet. 16-18. The United States' ability to take land into trust for the benefit of Indian tribes is critical to tribal self-governance and economic self-sufficiency. Trust acquisition is not only the central means of restoring and protecting tribal homelands, but also is critical to tribal economic

development that benefits both tribes and their neighboring communities.

Under the D.C. Circuit's decision, the doors to the federal courts are, for the first time, open to post hoc challenges to fully finalized trust land acquisition decisions of the United States. This creates uncertainty for the United States in relation to the final trust status of these lands, which in turn generates instability in tribal governments' ability to use the lands for their intended purposes, driving away potential investors at a time when access to capital is already one of the primary impediments to economic development in Indian country.

In considering whether the questions presented in the petitions merit review, Amicus seeks to more fully inform this Court with respect to the vital role trust land acquisition plays in the federal government's recognition of tribes' rights to self-determination, and moreover, how such acquisitions are a critical component in tribal economic development, which benefits both tribes and their surrounding non-Indian communities alike.

I. The United States' Ability to Take Land Into Trust is Central to Restoring and Protecting Tribal Homelands and Critical to Tribal Economic Development that Benefits Both Tribes and the Surrounding Non-Indian Community.

A. Tribal Self-Determination, Development, and Economic Prosperity Depend Upon Trust Land.

The federal government's trust-acquisition authority[2] continues to serve as "the primary means to help restore and protect homelands of the nation's federally recognized tribes," with "[t]he vast majority of land-into-trust applications" intended for "purposes such as providing housing, health care and education for tribal members and for supporting agricultural,

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[2] Tribal trust land is "land held in trust by the United States for the benefit of a tribe or individual Indian." *See Cohen's Handbook of Federal Indian Law* § 15.03, at 968 (2005). Statutory authority for the federal government to acquire land in trust for a tribe is generally premised on Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465, although other statutory bases, often specific to a particular tribe, exist as well. *See* U.S. Dep't of the Interior, *Bureau of Indian Affairs' Handbook on Acquisition of Title to Land Held in Fee or Restricted Fee to Trust* § 3.1 (May 20, 2008), *available at* http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf (listing statutory authorities). The land taken into trust can be located either within or contiguous to a tribe's existing reservation ("on-reservation") or outside the reservation's boundaries ("off-reservation"), with corresponding federal regulations governing each type of discretionary acquisition. *See* 25 C.F.R. § 151.10 (on-reservation); *id.* § 151.11 (off-reservation).

energy and non-gaming economic development." News Release, U.S. Dep't of the Interior, Salazar Policy on Land-into-Trust Sees Restoration of Tribal Lands as Key to Interior Strategy for Empowering Indian Tribes: Majority of Non-Gaming Trust Applications are Vital to Building Tribal Self-Determination Through Self-Sufficiency (Jul. 1, 2010), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc009902.pdf. Trust acquisitions thus serve to promote investment in tribal lands and infrastructure. Trust land accordingly plays a critical role in tribal economic development, which, as recognized by the U.S. Government Accountability Office ("GAO") in recent Congressional testimony, is correspondingly vital to improving the socioeconomic conditions of Indian tribes and their members. U.S. Gov't Accountability Office, GAO-11-543T, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands: Testimony Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives* 1, 5-7 (Apr. 7, 2011) (statement of Anu K. Mittal, Director, Natural Resources and Environment).

This correlation between investment on tribal land and improved socioeconomic conditions is well documented. Indeed, as tribes in the 1990's began to "invest[ ] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other areas supporting tribal self-governance, gaming and non-gaming tribes alike made "striking"

socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix-xi (The Harvard Project on Economic Development, Jan. 2005). These gains notwithstanding, however, tribes remain among the most economically distressed groups in the United States, with the U.S. Census Bureau reporting in 2008 a poverty rate of 27% among American Indians and Alaska Natives, compared with 15% among the population as a whole. U.S. GAO, GAO-11-543T, *supra*, at 1.

Further socioeconomic improvement in Indian country thus depends upon continued tribal economic development, in which the trust-acquisition process plays a vital role. *See generally* Julian Schriebman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol'y Rev. 353, 384 (1996) ("Trust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development efforts."). The Department of the Interior has accordingly asserted a strong commitment to "fulfill[ing] [its] trust responsibilities," which it recognizes are critical in "empower[ing] tribal governments to help build safer, stronger and more prosperous tribal communities."[3] Press Release, U.S. Dep't of the Interior,

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[3] In total, more than nine million acres of tribal land have been reacquired and taken into trust following the federal government's removal of more than 90 million acres of tribal land during the allotment period from 1887 to 1934 and the Termination Era of the 1950's and 60's. News Release, Salazar Policy, *supra*.

Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference.cfm. These trust land acquisitions go hand-in-hand with economic development, since "[h]aving a land base is essential for many tribal economic activities." U.S. GAO, GAO-11-543T, *supra*, at 3.

B. State and Local Governments and the Neighboring Non-Indian Communities also Reap Benefits from Trust Land Acquisitions.

Economic development in Indian country benefits not only tribes and their members, but surrounding local communities and states as well. Indeed, while the Department of the Interior specifically solicits comments from state and local governments detailing their concerns about the impact trust acquisitions may have on their tax bases and jurisdiction, *see* 25 C.F.R. §§ 151.10, 151.11, many trust acquisitions enjoy enthusiastic support from surrounding state and local governments, *see* U.S. GAO, GAO-11-543T, *supra*, at 4. This should not be surprising for several reasons. First, continued increases in tribes' socio-economic conditions lessen welfare service costs for all levels of government. Schriebman, *supra*, at 380. In addition, tribal economic development also directly infuses money into the broader non-Indian community. For example, tribal governments and reservation

businesses separately account for billions of dollars in off-reservation spending. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 604 (2004).[4] Moreover, tribal-state revenue sharing agreements and other voluntary payments provide millions in additional revenue to state and local government coffers. *See, e.g.*, Arizona Dep't of Gaming, Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties as of September 8, 2011, *available at* http://www.gm.state.az.us/tcontributions_pdf/TC_CummulativeFinal_FY11.pdf (last visited Sept. 25, 2011) (reporting $89 million contributed in the 2010 fiscal year and $721 million since contributions began in 2004); *see also* Schriebman, *supra*, at 381.

The Mississippi Band of Choctaw Indians provides just one example of a tribe whose impressive economic development efforts have conferred tremendous benefits on the broader local, state – and even national – communities. As of 2006, the Band had not only reinvested more than $210 million in projects throughout the State of Mississippi, but was also one of the ten largest employers in the State. U.S. Dep't of the Treasury, Comptroller of the Currency, *Commercial Lending in Indian Country: Potential Opportunities in an Emerging Market* 6 (Mar. 2006). By decreasing governmental costs, expanding revenue

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[4] In 1998, it was shown that tribal governments and reservation businesses accounted for $1.2 billion and $4.4 billion, respectively, in off-reservation spending. Graham, *supra*, at 604.

bases, and providing job opportunities, tribal economic development benefits Indians and non-Indians alike.

C. Two Case Studies in Successful Economic, Governmental, and Cultural Uses of Lands Acquired by the United States in Trust for Indian Tribes.

The successful use of tribal trust land extends far beyond gaming. The Mississippi Band of Choctaw Indians noted above, for example, successfully manages small businesses, industrial, and retail activities in addition to its gaming operations. *Id.* Moreover, the majority of the 560 federally recognized Indian tribes do not engage in any form of gaming operation. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 Lewis & Clark L. Rev. 943, 945 (2008). Indeed, of the more than 1,900 trust land applications pending in 2010, over 95% were for non-gaming purposes. News Release, Salazar Policy, *supra*.

The size, scope, and type of non-gaming development occurring on trust land varies greatly, as reflected in a 2006 GAO report that examined all non-gaming trust acquisition applications decided in 2005. U.S. Gov't Accountability Office, GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications: Report to Congressional Committees* 45-49 (July 2006). The proposed

uses for these trust lands included water treatment plants for bands of the Minnesota Chippewa Tribe, tribal schools for the Muckleshoot Indian Tribe in Washington and the Saginaw Chippewa Indian Tribe in Michigan, agriculture for tribes in Wyoming, Kansas, and Montana, community recreation and potential commercial development for the Ho-Chunk Nation of Wisconsin, and housing for various tribes in California, Connecticut, Minnesota, Wisconsin, Michigan, and Washington. *Id.*

1. The Chickasaw Nation.

The Chickasaw Nation in Oklahoma is also listed in the GAO report, and offers an illustration of how trust land acquisitions can be effectively used for an array of economic, governmental, and cultural purposes that empower the tribe's self-governance and benefit its members as well as the surrounding non-Indian community. Through cession of lands in the early 19th century – and ultimately forcible removal on the infamous Trail of Tears in 1837 – the Chickasaw were displaced from their ancestral homelands in and around what are now the states of Mississippi, Alabama, Tennessee, and Kentucky.[5] *See* Barry Pritzker, *A Native American Encyclopedia: History, Culture,*

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[5] The treaties by which this cession occurred include the Treaty with the Chickasaw, 7 Stat. 89 (1805); Treaty with the Chickasaw, 7 Stat. 150 (1816); Treaty with the Chickasaw, 7 Stat. 192 (1818); and Treaty with the Chickasaw, 7 Stat. 381 (1832).

and Peoples 371-72 (2000). The Chickasaw settled in the Indian Territory (modern-day Oklahoma) and, by an 1837 treaty, were made a district within the Choctaw nation. Treaty with the Choctaw and Chickasaw, 11 Stat. 573 (1837). The Chickasaw Nation's governmental independence was restored in 1855, though the Nation retained its interests in the lands secured to it under the 1837 treaty. *See* Pritzker, *supra*, at 372; *see also* Treaty with the Choctaw and Chickasaw, art. 2, 11 Stat. 611 (1855).

The Chickasaw Nation's land base was radically fractured through allotment around the turn of the 20th century, *see Cohen's*, *supra*, at § 4.07[1][c], at 305, "a situation that severely hampered tribal political and economic development well into the century," Pritzker, *supra*, at 372. Today, however, the Chickasaw Nation is recognized as a model of tribal economic development, with successful business endeavors that include not just gaming and tourism, but information technology, medical and dental staffing, aviation and space technology, construction, manufacturing, banking, and property management. *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of A Successful Policy* 11 (Native Nations Institute & Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs, Working Paper No. 1, Nov. 2010); *see also Diversifying Native Economies: Oversight Hearing Before the Comm. on Natural Res. of the U.S. House of Representatives*, 110th Cong. 109 (2007) (statement of Neal McCaleb,

Chairman of the Board of Directors, Chickasaw Nation Industries, Inc.).

This remarkable renaissance has been enabled in large part by the strategic rebuilding of the Chickasaw Nation's land base through trust acquisitions. In 2005, for example, the Secretary took a number of parcels into trust for the Nation to put to a variety of uses: tribal government offices; a tribal community center; expansion of a chocolate factory owned by the Nation; operation of a convenience store, gas station, restaurant, video arcade, and attendant parking space; and a sand and gravel processing plant. *See* U.S. GAO, GAO-06-781, *supra*, at 45-47. Acquisitions such as these have enabled the Nation both to build a diverse economic base and to make crucial investments in its government infrastructure and public services.

In addition, the benefits of the Chickasaw Nation's development efforts have been felt well beyond the Nation itself. As of 2007, the Nation employed some 10,400 workers, both Indian and non-Indian, with an annual payroll of nearly $200 million, estimated to generate more than $7.5 million in state tax revenues. *See Diversifying Native Economies*, *supra*, at 110-11 (statement of Neal McCaleb). As illustrated by this example, trust land acquisition can be instrumental in restoring a tribe's land base, and fostering economic, cultural, and governmental development benefiting the tribe and the surrounding community alike.

2. The Confederated Tribes of the Warm Springs Reservation.

In addition to its vital role for economic development, trust land acquisition also plays a critical role in benefiting tribes and local communities with respect to important non-economic development activity. This is particularly true in the area of natural resource preservation, as illustrated by the Confederated Tribes of the Warm Springs Reservation of Oregon. NCAI has been informed that this Tribe, for many years, has had the United States take land into trust in order to protect and enhance the off-reservation fishing, hunting, and traditional food gathering rights secured by the Tribe in an 1855 Treaty. *See* Treaty with the Tribes of Middle Oregon of June 25, 1855, 12 Stat. 963 (1855). In the late 1970's, for example, the Tribe, learning that an 888 acre off-reservation Treaty fishing site at Shears Falls on the Deschutes River was being sold by Burlington Northern Railroad, and fearing the site would be harmed if bought for development, purchased the site and applied to the Department of the Interior to have the land taken into trust. This trust acquisition occurred in 1980, with a guarantee from the Tribe of continued public access to the fishery, thus preserving the site for continued and uninterrupted use by both Treaty Indian and non-Indian fishermen alike.

Given this early success, trust acquisition continues to play a vital role in the Tribe's natural resource preservation efforts. NCAI is advised that just last year, for example, the Tribe succeeded in having

another 197 acre fishing site, the Eyerly property along the Metolius River, taken into trust. This marked the completion of an eleven-year administrative process with the Department of the Interior, and the land's newly-acquired trust status ensures that the Tribe can continue to actively manage the property in order to preserve and enhance its value as a fish and wildlife habitat, and as an area where tribal members may exercise their fishing, hunting and traditional food gathering rights under the 1855 Treaty. Moreover, the Tribe also has a number of other off-reservation fee land holdings it acquired for the specific purpose of protecting and enhancing their fish and wildlife resources, and that it hopes to have taken into trust in the future. As the Warm Springs Tribe illustrates, trust land plays a vital role in these conservation efforts.

II. The D.C. Circuit's Decision Creates Uncertainty as to Tribal Trust Lands' Status that will Drive Away Investors with the Capital Required for Tribal Economic Development.

The court of appeals' decision, if allowed to stand, threatens to critically undermine future development on trust land for tribes such as the Chickasaw Nation, frustrate the wildlife preservation and conservancy efforts of tribes like Warm Springs, as well as stymie proposed developments for the approximately 1,900 trust acquisition applications pending before the Department of the Interior and for all future trust

applications to be filed. The decision creates an omnipresent fear that the United States could be divested of title to land already taken into trust and slated for development. This is precisely the kind of uncertainty the GAO has identified as threatening to suffocate economic development and economic activity on trust land. *See* U.S. GAO, GAO-11-543T, *supra*, at 3-5. Irrespective of whether any such APA challenges are ever brought, much less succeed, the mere *possibility* of such suits being filed is enough to scare off investors wary of committing capital to development projects in which uncertainty is embedded. For these reasons, it is critical that the Court grant certiorari and clarify the law in this area promptly.

A. Access to Capital is Critical to Tribal Development But Withers When Faced With Perceived Instability.

It is widely recognized that inadequate access to capital is among the most significant impediments to tribal development. *See* U.S. Dep't of the Treasury, Community Development Financial Institutions Fund, *Report of the Native American Lending Study* 1-2 (Nov. 2001) ("lack of access to capital" was the "one significant factor" identified as the reason behind economic problems in Native American communities); Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* 6 (Native Nations Institute & Harvard Project on American Indian Economic Development, Joint Occasional Papers on

Native Affairs, No. 2003-02, 2003) (identifying the fact that "Tribes and individuals lack access to financial capital" as the first reason for "continuing reservation poverty"). The Director of the Office of Indian Energy and Economic Development succinctly summarized this problem in a statement to Congress: "Without capital, there is no enterprise; without enterprise, there are no private sector jobs." *Economic Development, Hearing Before the Senate Committee on Indian Affairs*, S. Hrg. 109-504, at 108 (May 10, 2006) (prepared statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Econ. Dev., Dep't of Interior). In fact, it has been reported that "[u]pwards of $50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development." Clarkson, *supra*, at 945.

It is similarly well recognized that uncertainty is one of the primary roadblocks to access to capital, and that greater stability is the main ingredient necessary in overcoming this barrier. Cornell & Kalt, *Reloading the Dice*, *supra*, at 24-25 ("Investors' risks are raised, for example, by uncertainty in tax and/or regulatory policy, and by insecurity in the enforcement of contracts and agreements. . . . The central problem is to create an environment in which investors – whether tribal members or outsiders – feel secure, and therefore are willing to put energy, time, and capital into the tribal economy."); *see also* U.S. Dep't of the Treasury, *Report of the Native American Lending Study*, *supra*, at 4 (listing areas of "uncertainty"

relating to legal infrastructure and government operations as among the barriers to capital access).

Questions regarding land title and jurisdictional status create the very kind of uncertainty that can hinder the availability of capital. Indeed, the GAO this past year spoke of this very concern – that "land in trust issues may create uncertainty" affecting economic activity on tribal land. U.S. GAO, GAO-11-543T, *supra*, at 3-5.

B. Heretofore, the Trust Acquisition Process Has Effectively Balanced the Need for Outside Input with the Stability Finality Affords.

Up until the D.C. Circuit's opinion, the trust acquisition process struck a well-formulated balance between the need to give voice to all interested parties and the need for finality once acquisition is complete. The federal regulations set forth in 25 C.F.R. Part 151 provide for the specific solicitation and consideration of comments from local and state governments regarding a proposed trust acquisition, as well as an opportunity for interested persons to seek judicial review after notice is published in the Federal Register. Once the administrative process is complete and title has transferred to the United States, however, the QTA forecloses challenge to the transfer, providing the finality that is vital to effective land use and development. Indeed, the Department of the Interior specifically crafted 25 C.F.R. § 151.12(b)'s

requirement for notice in the Federal Register in order to ensure that interested persons with the appropriate legal interest would have an opportunity for "judicial review before transfer of title to the United States," given that "[t]he Quiet Title Act (QTA), 28 U.S.C. 2409a, precludes judicial review after the United States acquires title." 61 Fed. Reg. 18082 (1996).

The Department of the Interior's trust-acquisition process is thus detailed and carefully crafted, allowing for local and state government input, as well as challenges from other appropriate persons, prior to the land being taken into trust. *See* U.S. GAO, GAO-06-781, *supra*, at 43. Moreover, it is a process that works, as shown in a 2006 GAO report noting the Department's compliance with its regulations for processing land in trust applications, including the comment process with respect to relevant state and local governments. *Id.* at 5. Furthermore, the Department of the Interior continually strives to make the trust acquisition process transparent, as evidenced by the 2008 introduction of its Handbook on Acquisition of Title to Land Held in Fee or Restricted Fee to Trust, which was specifically intended to provide "a single resource available to BIA staff and tribes [that] will enhance the quality and efficiency of service." Memorandum from Carl J. Artman, Assistant Secretary-Indian Affairs, to Jerry Gidner, Director, Bureau of Indian Affairs, and Vicki Forrest, Deputy Director, Trust Services (May 22, 2008), *Memo*

and Handbook available at http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf.

The regulatory scheme in place thus strikes the necessary balance to foster successful tribal development. It recognizes the finality of the United States' taking of land into trust, after first ensuring that interested local entities, individuals and governments have an opportunity to raise any of their concerns prior to completion of the trust acquisition.

C. The D.C. Circuit's Decision Undermines the Stability that the Trust Acquisition Process Provides.

The D.C. Circuit's decision upsets the careful balance that Congress and the Executive Branch have struck between outside input and finality. It casts an enduring shadow of uncertainty over the United States' title to all Indian land that has been or will be taken into trust, creating the very kind of instability and uncertainty that drives investors away from economic development.

This uncertainty is exacerbated by the fact that nothing in the D.C. Circuit's decision limits the grounds for potential challenges, so long as, perversely enough, the plaintiffs themselves are not claiming the most readily cognizable interest – a claim to title in the land. Under the court's rationale, a plaintiff claiming that a trust acquisition is ultra vires or otherwise unlawful for any reason – statutory or

otherwise – could proceed with his suit so long as the plaintiff himself did not claim title to the land. To take the most obvious example, the regulations governing trust acquisitions require the Secretary to consider numerous specific factors before making an acquisition, including (among others) the "need of the . . . tribe for additional land," the "purposes for which the land will be used," the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and "[j]urisdictional problems and potential conflicts of land use." *See* 25 C.F.R. § 151.10(b), (c), (e), (f). A plaintiff who is simply dissatisfied with the outcome of the Secretary's decision can sue to challenge a trust acquisition on the purported ground that the Secretary did not adequately consider these factors. *See, e.g., South Dakota v. U.S. Dep't of Interior*, 775 F. Supp. 2d 1129, 1141-44 (D. S.D. 2011) (rejecting State's arguments that trust acquisitions were arbitrary and capricious because DOI failed to adequately consider factors set forth in 25 C.F.R. § 151.10); *see also* 61 Fed. Reg. 18082-83 (recognizing that "[j]udicial review [of trust acquisitions] is available under the APA because the IRA does not preclude judicial review and the agency action is not committed to agency discretion by law").

As set forth above, challenges such as this (provided prudential standing exists) have heretofore been limited to the 30-day window between notice of an acquisition and actual transfer of title to the United

States. *See supra* Part II.B. The D.C. Circuit's decision, however, now opens the possibility of a spate of challenges to trust acquisitions based on variegated legal theories, brought by a virtually limitless class of potential plaintiffs, and subject only to the APA's six-year statute of limitations. The decision is devastating to tribal development efforts precisely because this theoretical possibility alone – not the merits or actual success of any particular suit – breeds the uncertainty that is so noxious to investment. Investors will balk at the prospect of committing millions of dollars to finance a major development project if there exists some significant and ever-enduring possibility that, after a parcel is taken into trust, the United States' title to the land will suddenly be challenged in court.

Further compounding this problem is the D.C. Circuit's equally expansive and unprecedented holding on prudential standing, such that the United States' title can be challenged by any person deemed appropriate to police agency compliance with the law. *See* Tribe Pet. 32-36; U.S. Pet. 18-23. Because the list of possible plaintiffs in such an APA action is seemingly limitless, tribes and developers will be unable to eliminate the possibility of such lawsuits by proactive negotiation and compromise.

In addition, the D.C. Circuit's decision is particularly problematic because, as a practical matter, it knows no geographical bounds. Up until that court's

decision, the Ninth, Tenth, and Eleventh Circuits – the only courts to directly confront this issue – were unanimous that the QTA barred challenges to the United States' title to Indian trust lands after the lapse of the 30-day review period contemplated by Part 151. The large number of tribes located within those circuits' geographical reach, *see generally* U.S. GAO, GAO-06-781, *supra*, at 11 (showing map and where tribes are located), however, can no longer rely upon those courts' long-established precedent in pursuing tribal economic development on trust land, inasmuch as any plaintiff could instead file suit in the District of Columbia and take advantage of the D.C. Circuit's holding.

For all these reasons, it is critical that this Court grant certiorari, and do so now, so that tribal development on trust land, which provides so many economic benefits to tribes, their members, and the surrounding communities, may continue.

CONCLUSION

For the foregoing reasons, NCAI urges the Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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Nos. 11-246 & 11-247

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WAYLAND TOWNSHIP, ALLEGAN COUNTY, ALLEGAN AREA EDUCATIONAL SERVICE AGENCY, WAYLAND UNION SCHOOLS, CITY OF WAYLAND, CITY OF ALLEGAN, DORR TOWNSHIP, MARTIN TOWNSHIP, YANKEE SPRINGS TOWNSHIP, DEPUTY SHERIFFS ASSOCIATION OF MICHIGAN, WAYLAND AREA CHAMBER OF COMMERCE, ALLEGAN AREA CHAMBER OF COMMERCE, DORR BUSINESS ASSOCIATION, WEST MICHIGAN HISPANIC CHAMBER OF COMMERCE, BARRY COUNTY CHAMBER OF COMMERCE, BARRY COUNTY ECONOMIC DEVELOPMENT ALLIANCE, GUN LAKE BUSINESS ASSOCIATION, ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The amici are local governments, business associations, and other entities in southwest Michigan, near the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Band") trust lands that are the subject of this action.[1] The 147-acre parcel at issue in this case is located within the boundaries of amicus curiae Wayland Township, a municipal corporation in Allegan County that is home to approximately 3,000 individuals.

Amici curiae Allegan County, Allegan Area Educational Service Agency, Wayland Union Schools, City of Wayland, Dorr Township, Martin Township, and Yankee Springs Township are local governments in southwest Michigan that, along with Wayland Township, are engaged in efforts to foster economic development in an area that includes the trust lands. The amici have entered into a revenue sharing agreement with the Band, pursuant to a compact between the Band and the State of Michigan, that has been approved by the Secretary of the Interior. Amicus curiae City of Allegan is a Michigan municipal corporation that has experienced economic growth as a result of the Band's development of the trust lands. Amicus curiae Deputy Sheriff's

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[1] Pursuant to Sup. Ct. Rule 37.6, the amici affirm that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the amici or their counsel made such a monetary contribution. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Association of Michigan, represents the interests of road and corrections deputies who have benefited from the job growth and retention arising out of the development of the trust lands.

Amici curiae Wayland Area Chamber of Commerce, Allegan Area Chamber of Commerce, Kalamazoo Regional Chamber of Commerce, Dorr Business Association, West Michigan Hispanic Chamber of Commerce, Barry County Chamber of Commerce, Barry County Economic Development Alliance, and Gun Lake Business Association are business associations in southwest Michigan whose members have benefited from cooperative economic development efforts involving the Band and its use of the trust lands. The businesses represented by these associations would suffer devastating job losses and decreased revenue if the land were taken out of trust and all of the investment in the economic development of the area were destroyed. Amicus curiae Plummer Supply, Inc., is a local business located near the trust lands that has benefited from the Band's economic development initiatives.

Collectively, the amici curiae represent numerous individuals and businesses that support and have been positively affected by the Band's economic development activities on the trust land. They submit this brief to explain the substantial local benefits that arise from the cooperative and mutually reinforcing economic development efforts of the Band, the regional governments, and local businesses. The amici curiae urge this Court to grant the petitions for certiorari to resolve the debilitating uncertainty and economic instability created by the court of appeals' decision, which

threatens to stifle economic development in a State and region that has endured a disproportionate amount of economic suffering in recent years.

INTRODUCTION

Michigan's economic troubles in recent years have been the subject of national headlines.[2] Faced with skyrocketing unemployment and a decimated automotive industry, Michigan has been described as "ground zero in the national economic downturn."[3] Southwest Michigan has not escaped these economic hardships. Although local governments in the region have worked to stimulate job growth and attract revenue, recovery has been stagnant.[4]

In recent months, however, southwest Michigan's economy has received a much-needed boost. On February 10, 2011, the Band opened a $165 million gaming facility known as Gun Lake Casino. The facility occupies part of a 147-acre parcel held by the United States in trust for the Band pursuant to the Indian Reorganization Act, 25

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[2] *See, e.g.*, Susan Saulny & Monica Davey, *New Economic Fears Arise in Michigan*, N.Y. TIMES, Nov. 22, 2008, http://www.nytimes.com/2008/11/23/us/23michigan.html.

[3] *Id.*

[4] *On Labor Day, High Unemployment in Michigan, but Hope for Better Things*, GRAND RAPIDS PRESS, Sept. 4, 2011, http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/09/on_labor_day_high_unemployment.html; Julia Bauer, *Unemployment Rises Again in West Michigan; Regional Labor Pool Also Shrinks*, GRAND RAPIDS PRESS, Apr. 23, 2009, http://www.mlive.com/business/west-michigan/index.ssf/2009/04/unemployment_rises_again_in_we.html.

U.S.C. § 465. The Band's economic development efforts on the trust lands have directly created 900 new jobs and infused area hotels, restaurants, and other service providers with new business. Additionally, the Band has entered into a revenue sharing agreement with regional governments that will provide essential resources for schools, roads, sewer and water systems, public safety programs, and other critical needs. The Band's economic development efforts have also improved morale and promoted intergovernmental service-sharing agreements, which are critical to the region's recovery.

Now, a decision of the Court of Appeals for the District of Columbia Circuit threatens to unravel the tremendous economic benefits generated by the Band's development of the trust lands. In a decision that openly conflicts with decisions of other federal courts of appeals, the D.C. Circuit held that an individual, Respondent David Patchak, has prudential standing to challenge the Secretary of the Interior's authority to place the land into trust, and that the United States is not immune from Patchak's suit under the Quiet Title Act, 28 U.S.C. § 2409a. Patchak's suit seeking to divest the United States of title to the trust lands has created uncertainty and economic instability for local governments and businesses in Southwest Michigan, making it difficult to plan and execute strategies for economic development and business growth.

The amici curiae have relied on the Band's economic development efforts, and the trust status of the lands on which the Band has developed its gaming facility, to plan infrastructure improvements,

negotiate intergovernmental agreements, and begin rebuilding their local economies. The amici regional governments have entered into a revenue sharing agreement with the Band, and have relied on revenue projections for the trust lands in planning for the development and delivery of government services to individuals and businesses, including critical infrastructure improvements. In addition, local businesses have based their planning and investment on economic development of the trust lands. The court of appeals' decision eliminates the stability that is essential for local governments and businesses. In light of the wide-reaching and disruptive impact of the court of appeals' decision, immediate review by this Court is urgently needed.

ARGUMENT

The Court of Appeals' Decision Warrants Review by This Court Because Local Governments and Businesses Must Be Able to Rely on the Status of Federal Land to Engage in Economic Planning and Development.

I. The Court of Appeals' Decision Creates Uncertainty And Instability In Communities Surrounding The Trust Lands.

In 2001, the Band submitted a fee-to-trust application to the Secretary of the Interior, requesting that a 147-acre tract, known as the "Bradley Tract," be taken into trust under the Indian Reorganization Act for future use as a gaming facility. *See* 25 U.S.C. §§ 467, 2719. The Bradley Tract, located in Wayland Township, is adjacent to

the freeway and was the site of an abandoned manufacturing facility. This site had not been used for several years.

After an administrative review process that included an extensive environmental assessment, the Secretary published notice that the Bradley Tract would be taken into trust for the Band. *See* 70 Fed. Reg. 25,596-97. The notice announced a thirty-day waiting period, the purpose of which was "to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." *Id.* The notice clearly stated that the Bradley Tract would be "used for the purpose of construction and operation of a gaming facility." *Id.*

During the thirty-day waiting period, an anti-gambling organization known as Michigan Gambling Opposition ("MichGO") filed suit to challenge the Secretary's decision to take the Bradley Tract into trust. Both the district court and the court of appeals rejected MichGO's claims on the merits. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008). The Secretary then placed the land into trust, and the Band proceeded with its plans to develop the trust lands. On February 10, 2011, the Band opened a $165 million gaming facility, Gun Lake Casino, on the trust lands.

Respondent David Patchak did not file suit during the thirty-day waiting period. After MichGO's suit was rejected, however, Patchak filed suit against the Secretary of the Interior and the Assistant Secretary for the Bureau of Indian Affairs (collectively, "Secretary"), challenging the Secretary's

decision to take the Bradley Tract into trust. Patchak alleged that because he lived near the Bradley Tract, he would be injured by the noise, pollution, and crime that assertedly will be generated by the gaming facility. *Patchak v. Salazar*, 632 F.3d 702, 703 (D.C. Cir. 2011). Patchak's suit seeks an injunction reversing the Secretary's decision to take the Bradley Tract into trust. If successful, the suit could require Gun Lake Casino to close its doors. As a result, 900 employees would lose their jobs, and local governments and businesses would lose millions of dollars in annual revenues and economic development opportunities.

The United States District Court for the District of Columbia rejected Patchak's suit, holding that Patchak lacks standing and that this litigation is barred by sovereign immunity. *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009). The Court of Appeals for the District of Columbia Circuit reversed, concluding that Patchak has prudential standing to enforce the Indian Reorganization Act and that the Indian lands exception to the Quiet Title Act's waiver of sovereign immunity is inapplicable. *Patchak*, 632 F.3d at 705, 710. Both the Secretary and the Band now seek review by this Court.

The court of appeals' decision casts a shadow of uncertainty over local governments and businesses near the trust lands. The amici regional governments have planned infrastructure improvements, public safety projects, and community initiatives in reliance on the trust status of the land and its resulting economic development. The court of appeals' decision is causing great disruption to the

amici regional governments' ability to develop and implement infrastructure improvements and other initiatives. Similarly, possible divestiture of the federal government's title to the Bradley Tract at this late juncture threatens to unravel the many benefits that the economic development of that Tract has conferred on the region, and makes it difficult for businesses to plan and execute investments that will contribute to the region's economic recovery.

II. The Band's Development Of The Trust Lands Benefits Southwest Michigan's Economy And Provides Local Governments With Critical Resources.

The Band's development of the trust lands provides very significant and wide-reaching benefits to area communities. Most directly, the Band's opening of the gaming facility created 900 new jobs in early 2011. This job creation was particularly welcome because Allegan County, in which the trust lands are located, reported an 11.9% unemployment rate during 2010, more than two percent points higher than the national unemployment rate.[5] In addition to these 900 jobs, some 750 skilled trades workers, including plumbers, electricians, carpenters, and sheet metal workers,[6] were employed

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[5] *County-Level Unemployment and Median Household Income for Michigan*, USDA ECONOMIC RESEARCH SERVICE, Aug. 23, 2011, http://www.ers.usda.gov/data/unemployment/RDList2.asp?ST=MI.

[6] *Gun Lake Casino Opening Weekend Draws a Full House*, SW. MICH.'S SECOND WAVE, Feb. 17, 2011, http://swmichigan.secondwavemedia.com/devnews/casino0217.aspx.

during the construction of the $165 million facility.[7] Development of the trust lands has also indirectly created an estimated 1,000 outside vendor jobs.[8] The new jobs translate into significant and wide-reaching benefits for area communities because the employees pay local taxes and spend money at local businesses.[9]

The Band estimates that, as a result of its efforts to develop the trust lands, it will spend $30 million annually on vendor goods and services.[10] Most of those goods and services will be purchased in southwest Michigan.[11]

The Band's development of the trust lands facility has resulted in significant collateral benefits to the area economy. The Band estimates that the facility will create 60,000 annual new guest stays at area hotels and $4.4 million in additional revenues for area hotels.[12] The casino's opening has also

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[7] Herb Woerpel, *Tribe Secures $165 Million Loan for Gun Lake Casino*, PENASEE GLOBE, July 20, 2010, http://www.mlive.com/penaseeglobe/index.ssf/2010/07/tribe_secures_165_million_loan.html.

[8] *Gun Lake Casino Opening Weekend*, *supra* note 6.

[9] Ryan Lewis, *Wayland School, Township Win Big Checks*, ALLEGAN CNTY. NEWS, July 27, 2011, http://www.allegannews.com/articles/2011/07/28/local_news/2.txt.

[10] Pete Daly, *Gun Lake Casino to Break Ground Sept. 17*, GRAND RAPIDS BUS. J., Aug. 31, 2009, http://www.grbj.com/GRBJ/ArticleArchive/2009/August/August+31/BREAKING+NEWS.htm.

[11] *Gun Lake Casino Opening Weekend*, *supra* note 6.

[12] *Wayland Casino to Break Ground Sept. 17*, WOOD TV 8, Sept. 3, 2009, http://www.woodtv.com/dpp/news/local/gun_lake_region/Wayland_casino_to_break_ground_September_17.

contributed to increased business for area restaurants, gas stations, drycleaners, landscapers, and other businesses. The facility has room to expand, which means that the economic benefits to the region can grow over time.[13] But expansion can occur only if the status of the land is stable, and local governments and businesses can rely on it as a basis for economic planning.

Notably, the Band has agreed to share a portion of the net revenues generated by the gaming facility with surrounding local governments. On May 9, 2007, the Band and the State of Michigan entered into a Class III Gaming Compact, which was approved by the Secretary of the Interior by operation of law. Under the compact, Gun Lake Casino is obligated to pay two percent of its net slot machine revenue to local units of government within the immediate vicinity of Gun Lake Casino. The revenue is allocated by a local revenue sharing board created under Michigan's Urban Cooperation Agreement of 1967, Mich. Comp. Laws § 124.501 *et seq.*

Pursuant to the compact, an interlocal agreement was executed between the Gun Lake Tribe and ten public agencies: the County of Allegan; the Township of Wayland; Wayland Union School District; Allegan Area Educational Service Agency; the City of Wayland; the Township of Dorr; the Township of Leighton; the Township of Martin; the Township of Hopkins; and the Township of

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[13] *Gun Lake Casino Opening Weekend*, *supra* note 6.

Yankee Springs. The interlocal agreement creates the Match-E-Be-Nash-She-Wish Wayland Township Area Local Revenue Sharing Board (the "Board"), a separate legal entity charged with establishing criteria or formulas for distributing and disbursing revenues to the local governments. The Board comprises three members of the Band and three representatives from the local governments.

In June of 2011, Gun Lake Casino made its first distribution under the revenue sharing agreement, based on just two months of operations. Gun Lake Casino distributed a total of $514,871.00 to local governments, plus more than $2 million to the State of Michigan. Of the distributions to local governments, Wayland Union Schools received $194,628.31 and the Allegan Area Educational Service Agency received $32,163.63.[14] Future distributions will be made in six-month increments.

Based on the revenue sharing agreement, local governments have begun planning critical infrastructure projects and other initiatives that would not be feasible without the Band's cooperative economic development efforts. Wayland Township, for example, is planning the construction of a water and sewer treatment system that would eliminate reliance on aging septic systems and provide important environmental protections.[15] With its first share of the revenue, Wayland Township has

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[14] Lewis, *supra* note 9.

[15] *Wayland Twp Board Talks Casino Plans*, WOOD TV 8, Feb. 2, 2009, http://www.woodtv.com/dpp/news/Wayland_Twp_board_talks_casino_plans.

undertaken a feasibility study in connection with the proposed water and sewer system, entered into an option contract for purchase of property upon which to locate the sewer and water systems, and is making plans for road improvements that would otherwise have been deferred.[16]

Wayland Union School District is using the shared revenue to cut preschool tuition rates by one-third, which will allow more children the opportunity to receive a preschool education.[17] To further help families, Wayland Union School District is also using part of its revenue disbursement to subsidize "pay to play" athletic fees for students.[18] Typically, each high school student must pay $100.00 per sport to participate in school athletics, in addition to any costs for equipment and camps. The Band's shared revenue will eliminate this fee and thus alleviate the financial burden on families of high school athletes.

Additionally, Wayland Union School District intends to establish a scholarship fund for graduating seniors to encourage families to stay in

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[16] Lewis, *supra* note 9.

[17] Julie Makarewicz, *Wayland Union School District Finds Uses for Gun Lake Casino Payment*, GRAND RAPIDS PRESS, Aug. 23, 2011, http://www.mlive.com/wayland/2011/08/wayland_union_school_district.html.

[18] Lisa LaPlante, *No More Pay-to-Play for Wayland Wildcats, Thanks to Casino*, FOX 17 NEWS, Aug. 24, 2011, http://www.fox17online.com/news/fox17-wayland-schools-no-more-paytoplay-for-wayland-wildcats-thanks-to-casino-20110824,0,4518511.story; *see also* Makarewicz, *supra* note 17.

the Wayland area.[19] The school district will also use shared revenue to fund maintenance and capital projects.[20] This will permit more of the district's general funds to be used in the classroom, rather than on building improvements.

The revenue sharing agreement also allows local communities to bolster their public safety programs and engage in collaborative intergovernmental agreements. Wayland Township is using a portion of the shared revenue to fund a contract with the Allegan County Sheriff's Department, under which Allegan County will provide two deputies dedicated to patrolling Wayland Township.[21] Along with increased public safety, this cooperation between municipalities yields intangible benefits for the morale of the community.

In addition to the benefits from the revenue sharing agreement, the Band's economic development efforts on the trust lands have also contributed directly to area communities. Most recently, the Band and Gun Lake Casino donated $12,000.00 to the Allegan County Sheriff's Department to purchase a police K-9 dog that can be used for "search and rescue tactics, locating a lost

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[19] Lindsey Smith, *Gun Lake Casino's First Payout to State, Local Governments Top Expectations*, MICH. RADIO, June 2, 2011, http:// michiganradio.org/post/gun-lake-casino%E2%80%99s-first-payout-state-local-governments-top-expectations.

[20] Makarewicz, *supra* note 17.

[21] Lewis, *supra* note 9.

child, and identifying illegal substances."[22] The donation illustrates a newly forged partnership between the Band and local law enforcement, which ultimately benefits all of the area's residents.

Although Gun Lake Casino has been open for just nine months, it has already bolstered the region's economy and promoted positive, cooperative relationships between municipalities and between the Band and the general community. Until the court of appeals issued its decision, these economic and community benefits were expected to increase over time, particularly as the local governments commence infrastructure improvements using shared revenue from the casino. All of these positive developments are threatened by the court of appeals' decision, which has created instability and uncertainty that is highly disruptive to government and business planning and investment.

III. Allowing Third Party Litigation To Divest The Federal Government Of Land Will Adversely Affect Local Governments' Ability To Undertake Essential Improvements.

Given the beneficial impact of the Band's development of the trust lands in southwest Michigan, the consequences of allowing an individual litigant to destabilize economic and business

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[22] Press Release, Gun Lake Casino, Gun Lake Tribe and Gun Lake Casino Donate Police K-9 to Allegan County Sheriff's Department (Aug. 25, 2011), http://www.mbpi.org/PDF/News/Press%20Releases/PR_K-9_Donation_8-25-11.pdf.

planning in the region are clear. As a result of the court of appeals' decision, the Band and regional governments and businesses can no longer plan and implement economic development and investment plans based on an assurance that the United States holds title to the Bradley Tract in trust for the tribe. The region could lose jobs—both at Gun Lake Casino and at the businesses that have boomed as a result of Gun Lake Casino's operation—during a period of already high unemployment. In addition, governments and businesses are faced with the possible loss of $30 million of revenue from Gun Lake Casino's purchase of supplies and services. Local governments also face the possible loss of taxes and shared revenues generated by the gaming facility. This uncertainty is disruptive to economic development plans, which require a high degree of certainty and stability.

Local governments and businesses near the Band's gaming facility must be able to rely on the federal government's decision to take the Bradley Tract into trust, in order to commence infrastructure improvements, implement public safety programs, and otherwise engage in responsible planning. Local governments cannot budget for such improvements if they do not know whether Gun Lake Casino will continue to operate. For example, Wayland Township intends to construct a $17 million water and sewer treatment system, which would not be feasible without the ongoing operation of Gun Lake Casino. Wayland Township cannot effectively implement such a sizeable infrastructure project without substantial certainty about the trust status of the land. Thus, the court of appeals' decision has

left an entire region in limbo: can communities begin improving their roads, sewer systems, and water systems, or must they refrain from making these improvements because the federal government might, in the future, be divested of title to the land?

The court of appeals' decision will have an impact that extends far beyond southwest Michigan. Local governments across the country must be able to rely on the federal government's decision to take land into trust, and the stability of the federal government's title, so that they can enter into contracts to construct improvements and undertake other important public projects. Allowing challenges to the status of trust lands after title has been transferred to the United States (and after a business is operating on the land) will result in crippling instability and uncertainty that will frustrate cooperative economic development efforts, such as the beneficial efforts engaged in by the Band and the Local Governments and Associations. Such instability and uncertainty will stifle economic development during at a time when it is sorely needed.

This Court has long held that a basic purpose of the law is to provide predictability. *See, e.g.*, *Regan v. New York*, 349 U.S. 58, 64 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs . . . ."). The court of appeals' decision eliminates predictability and places local governments in a precarious position: they are handed resources to improve their communities and grow their economies, but they do not know whether the resources will suddenly be taken away. Local governments need stability to climb out of the

recession and build stronger communities, and the court of appeals' decision takes away that critical stability. Accordingly, this Court's immediate review of the court of appeals' decision is warranted.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the Petitions for Certiorari filed by the Solicitor General and the Band, the amici curiae respectfully request that this Court grant the petitions for certiorari.

Respectfully submitted,

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September 2011

JOINT APPENDIX

RECORD
AND
BRIEFS

Nos. 11-246 and 11-247

In The
Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Petitions for Writ of Certiorari Filed August 25, 2011
Certiorari Granted December 12, 2011

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		Declaration of Chairman David K. Sprague, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit J, # 13 Exhibit K, # 14 Exhibit L, # 15 Exhibit M, # 16 Exhibit N, # 17 Exhibit O, # 18 Exhibit P, # 19 Exhibit Q, # 20 Exhibit Proposed Answer, # 21 Text of Proposed Order) (jf,) (Entered: 08/22/2008)
		* * *
08/28/2008		MINUTE ORDER granting 13 MOTION to Intervene by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. It is hereby ORDERED that the unopposed motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b) is GRANTED and it is hereby further ORDERED that movant is permitted to intervene as a defendant in this matter. Signed by Judge Richard J. Leon on 08/28/2008. (lcrjl1) (Entered: 08/28/2008)
08/28/2008	14	ANSWER to 1 Complaint by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI

RELEVANT DOCKET ENTRIES

United States District Court
District of Columbia
Case No. 1:08-cv-01331-RJL

David Patchak v. Dirk Kempthorne, et al.

Date Filed:	No.	Docket Text
08/01/2008	1	COMPLAINT against DIRK KEMPTHORNE, CARL J. ARTMAN (Filing fee $ 350, receipt number 4616014126) filed by DAVID PATCHAK. (Attachments: # 1 Civil Cover Sheet) (jf,) (Entered: 08/05/2008)
		* * *
08/01/2008	2	NOTICE OF RELATED CASE by DAVID PATCHAK. Case related to Case No. 05-1181. (jf,) (Entered: 08/05/2008)
08/08/2008	3	STANDING ORDER. Signed by Judge Richard J. Leon on 08/08/2008. (lcrjl1) (Entered: 08/08/2008)
		* * *
08/19/2008	13	MOTION to Intervene by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Memorandum in Support, # 2

		INDIANS. Related document: 1 Complaint filed by DAVID PATCHAK. (jf,) (Entered: 08/29/2008)
		* * *
10/06/2008	19	MOTION for Judgment on the Pleadings by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Exhibit News Article, # 2 Exhibit Meeting Minutes, # 3 Text of Proposed Order) (Schulte, Conly) (Entered: 10/06/2008)
10/06/2008	20	MOTION to Dismiss for Lack of Jurisdiction by DIRK KEMPTHORNE, CARL J. ARTMAN (Attachments: # 1 Memorandum in Support, # 2 Certificate of Service) (Allery, Gina) (Entered: 10/06/2008)
10/06/2008	21	NOTICE of Administrative Record Filing by DIRK KEMPTHORNE, CARL J. ARTMAN (Attachments: # 1 Declaration, # 2 Declaration, # 3 Index, # 4 Privilege Log) (Allery, Gina) (Entered: 10/06/2008)
		* * *

10/17/2008	23	MOTION to Stay by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Exhibit Exhibits 1-9, # 3 Text of Proposed Order, # 4 Certificate of Service) (Marzouk, Tobey) (Entered: 10/17/2008)
10/17/2008	24	Memorandum in opposition to re 20 MOTION to Dismiss for Lack of Jurisdiction, 19 MOTION for Judgment on the Pleadings filed by DAVID PATCHAK. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibits 5-7, # 5 Exhibit Exhibit 8, # 6 Exhibit Exhibit 9, # 7 Text of Proposed Order Order-Motion to Dismiss, # 8 Text of Proposed Order Order-Motion for Judgment on Pleadings, # 9 Certificate of Service) (Marzouk, Tobey) (Entered: 10/17/2008)
		* * *
10/27/2008	28	REPLY to opposition to motion re 20 MOTION to Dismiss for Lack of Jurisdiction filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Exhibit, # 2 Text of Proposed Order, # 3 Certificate of Service)

		(Allery, Gina) (Entered: 10/27/2008)
10/27/2008	29	Memorandum in opposition to re 23 MOTION to Stay filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Declaration, # 2 Text of Proposed Order, # 3 Certificate of Service) (Allery, Gina) (Entered: 10/27/2008)
10/27/2008	30	REPLY to opposition to motion re 19 MOTION for Judgment on the Pleadings filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit A - City of Tacoma v Andrus Order) (Schulte, Conly) (Entered: 10/27/2008)
10/27/2008	31	Memorandum in opposition to re 23 MOTION to Stay filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Affidavit Decl of Sprague, # 2 Exhibit A - Ampro Site, # 3 Exhibit B - MichGO v Kempthorne 4-29-08 Decision, # 4 Exhibit C - Mtn to Supplement Issues, # 5 Exhibit D - MichGO v Kempthorne 3-19-08 Order, # 6 Exhibit E - MichGO v

		Kempthorne 7-25-08 Order, # 7 Exhibit F - Petition, # 8 Exhibit G - 23 Is Enough Supporters, # 9 Errata H - 6-13-05 News Article, # 10 Exhibit I - 2-24-07 News Article, # 11 Exhibit J - 2-25-07 News Article, # 12 Exhibit K - 9-05 Letter from Boorsma, # 13 Exhibit L - Patchak Campaign Ad, # 14 Exhibit M - Amicus Brief, # 15 Exhibit N - Wayland Meeting Minutes, # 16 Exhibit O - Wayland Meeting Minutes, # 17 Text of Proposed Order) (Schulte, Conly) (Entered: 10/27/2008)
11/05/2008	32	MEET AND CONFER STATEMENT. (Schulte, Conly) (Entered: 11/05/2008)
11/06/2008	33	REPLY to opposition to motion re 23 MOTION to Stay filed by DAVID PATCHAK. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Errata Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Certificate of Service) (Marzouk, Tobey) (Entered: 11/06/2008)
11/13/2008		MINUTE ORDER denying 23 MOTION to Stay by DAVID

PATCHAK. It is hereby ORDERED that the motion is DENIED. Signed by Judge Richard J. Leon on 11/13/2008. (lcrjl1) (Entered: 11/13/2008)

* * *

01/08/2009	36	MOTION for Temporary Restraining Order / Preliminary Injunction by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Certificate of Notice and Compliance With Local Rule 65.1(a), # 3 Text of Proposed Order, # 4 Certificate of Service, # 5 Exhibit 7, # 6 Exhibit 8, # 7 Exhibit 9, # 8 Exhibit 1, # 9 Exhibit 2, # 10 Exhibit 3, # 11 Exhibit 4, # 12 Exhibit 5, # 13 Exhibit 6) (Marzouk, Tobey) (Entered: 01/08/2009)
01/08/2009	37	RESPONSE to Plaintiff's re 36 MOTION for Temporary Restraining Order / Preliminary Injunction Request for Emergency Hearing filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly). (Entered: 01/08/2009)

* * *

01/09/2009	39	Memorandum in opposition to re 36 MOTION for Temporary Restraining Order / Preliminary Injunction (Corrected) filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly) (Entered: 01/09/2009)
		* * *
01/09/2009	40	Memorandum in opposition to re 36 MOTION for Temporary Restraining Order / Preliminary Injunction filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Affidavit, # 2 Certificate of Service) (Allery, Gina) (Entered: 01/09/2009)
01/09/2009	41	Joint MOTION for Order Regarding Joint Motion for Delayed Consideration of Plaintiff's Emergency Motion for Temporary Restraining Order Until January 14, 2009 by DAVID PATCHAK (Attachments: # 1 Proposed Order Regarding Joint Motion for Delayed Consideration of Plaintiff's Emergency Motion for Temporary Restraining Order Until January 14, 2009) (Marzouk, Tobey) (Entered: 01/09/2009)

01/12/2009	42	NOTICE OF SUPPLEMENTAL AUTHORITY by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Exhibit Order List) (Schulte, Conly) Modified on 1/13/2009 (jf,). (Entered: 01/12/2009)
01/14/2009	43	STIPULATION re 36 MOTION for Temporary Restraining Order / Preliminary Injunction by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly) (Entered: 01/14/2009)
01/14/2009	44	REPLY to opposition to motion re 36 MOTION for Temporary Restraining Order / Preliminary Injunction filed by DAVID PATCHAK. (Attachments: # 1 Certificate of Service) (Marzouk, Tobey) (Entered: 01/14/2009)
01/21/2009	45	NOTICE of Decision in MichGO v. Kempthorne by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Schulte, Conly) (Entered: 01/21/2009)
01/23/2009	46	Emergency MOTION for Temporary Restraining Order Enjoining Defendants from Taking Land Into Trust Pending

		a Decision on Motion for Temporary Restraining Order / Preliminary Injunction (with Certificate of Service) by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order) (Marzouk, Tobey) (Entered: 01/23/2009)
01/23/2009	47	Memorandum in opposition to re 46 Emergency MOTION for Temporary Restraining Order Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order / Preliminary Injunction (with Certificate of Service) Emergency MOTION for Temporary Restraining Order Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order / Preliminary Injunction (with Certificate of Service) filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Attachment A (Opposition To Plaintiff's Second Motion For Injunctive Relief)) (Ahn, Demian) (Entered: 01/23/2009)

01/23/2009	48	REPLY to opposition to motion re 46 Emergency MOTION for Temporary Restraining Order Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order / Preliminary Injunction (with Certificate of Service) Emergency MOTION for Temporary Restraining Order Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order / Preliminary Injunction (with Certificate of Service) filed by DAVID PATCHAK. (Marzouk, Tobey) (Entered: 01/23/2009)
		* * *
01/26/2009		Minute Entry for proceedings held before Judge Richard J. Leon. Motion Hearing held on 1/26/2009. MOTION 36 for Temporary Restraining Order filed by DAVID PATCHAK - Heard and Denied. Motion for 36 Preliminary Injunction filed by DAVID PATCHAK - Taken Under Advisement. (Court Reporter Patty Gels.) (kc) (Entered: 01/26/2009)

* * *

03/02/2009	50	ORDER that the plaintiff shall submit in writing within 21 days of this Order a memorandum addressing whether this Court retains subject matter jurisdiction in this case in light of the Quiet Title Act, 28 U.S.C. 2409a(a); and it is further ORDERED that defendants and defendant-intervenor shall each have 14 days after service of plaintiff's memorandum in which to file a response, if any. Signed by Judge Richard J. Leon on 2/27/09. (see order.) (kc) (Entered: 03/02/2009)
03/20/2009	51	MEMORANDUM re 50 Order, by DAVID PATCHAK. (Attachments: # 1 Exhibit Argument Transcript Excerpt) (Courtade, Bruce) (Entered: 03/20/2009)
04/02/2009	52	MOTION for Summary Judgment by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Exhibit Exhibit 1, # 3 Text of Proposed Order, # 4 Certificate of Service) (Courtade, Bruce) (Entered: 04/02/2009)
04/06/2009	53	RESPONSE re 51 MEMORANDUM re 50 Order, filed by DIRK KEMPTHORNE,

		CARL J. ARTMAN. (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order) (Allery, Gina) Modified as to correct docket text on 4/7/2009 (jf,). (Entered: 04/06/2009)
04/06/2009	54	MEMORANDUM in support of re 51 MEMORANDUM re 50 Order, by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Ahn, Demian) Modified as to the correct docket text on 4/7/2009 (jf,). (Entered: 04/06/2009)
04/07/2009	55	MOTION to Stay Briefing on Plaintiff's Motion For Summary Judgment by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Text of Proposed Order) (Schulte, Conly) (Entered: 04/07/2009)
04/09/2009		MINUTE ORDER granting 55 MOTION to Stay Briefing on Plaintiff's Motion For Summary Judgment by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. It is hereby ORDERED that the motion is GRANTED and it is further ORDERED that briefing on plaintiff's 52 motion for

		summary judgment is STAYED pending the Court's resolution of the pending 19 motion for judgment on the pleadings and 20 motion to dismiss for lack of jurisdiction. Signed by Judge Richard J. Leon on 4/9/2009. (lcrjl1) (Entered: 04/09/2009)
08/20/2009	56	MEMORANDUM OPINION. Signed by Judge Richard J. Leon on 8/19/09. (kc) (Entered: 08/20/2009)
08/20/2009	57	ORDER REVERSED PURSUANT TO USCA MANDATE FILED 4/28/11.....ORDER denying Motion 36 for TRO; denying Motion 41 for Order; denying Motion 46 for TRO; denying Motion 52 for Summary Judgment and granting Motion 19 for Judgment on the Pleadings and granting Motion 20 to Dismiss for Lack of Jurisdiction. ORDERED that this case be DISMISSED with prejudice. SO ORDERED. Signed by Judge Richard J. Leon on 8/19/09. (kc) Modified on 5/2/2011 (zsmm). Modified on 5/2/2011 (zsmm). (Entered: 08/20/2009)
09/15/2009	58	NOTICE OF APPEAL as to 57 Order on Motion for TRO, Order

		on Motion for Order,, Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion to Dismiss/Lack of Jurisdiction,,,,,, by DAVID PATCHAK. Filing fee $ 455, receipt number 00900000000001961103. Fee Status: Fee Paid. Parties have been notified. (Courtade, Bruce) (Entered: 09/15/2009)
09/16/2009		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 58 Notice of Appeal, (jf,) (Entered: 09/16/2009)
09/22/2009		USCA Case Number 09-5324 for 58 Notice of Appeal, filed by DAVID PATCHAK. (jf,) (Entered: 09/23/2009)
01/08/2010	59	ORDER of USCA as to 58 Notice of Appeal, filed by DAVID PATCHAK; USCA Case Number 09-5324. Upon consideration of the motion to dismiss in part, the response thereto, and the reply, it is ORDERED that the motion to dismiss in part be referred to the merits panel to which this appeal is assigned. The parties are directed to address in their briefs the issues presented in the motion to dismiss in part rather than

		incorporate those arguments by reference. The Clerk is directed to enter a briefing schedule. (kb) (Entered: 01/08/2010)
		* * *
04/28/2011	61	MANDATE of USCA (certified copy) as to 58 Notice of Appeal, filed by DAVID PATCHAK; USCA Case Number 09-5324. ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date. (Attachments: # 1 Opinion) (zsmm) (Entered: 05/02/2011)
		* * *

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the District of Columbia Circuit
Case No. 09-5324

David Patchak v. Kenneth Salazar, et al.

Date Filed:	Docket Text
09/21/2009	US CIVIL CASE docketed. [09-5324] (Lister, Mary)
09/21/2009	NOTICE OF APPEAL filed [1207339] by David Patchak seeking review of a decision by the U.S. District Court in 1:08-cv-01331-RJL. Assigned USCA Case Number [09-5324] (Lister, Mary)
	* * *
10/22/2009	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1212267] by David Patchak [Service Date: 10/22/2009] [09-5324] (Bursch, John)
10/22/2009	DOCKETING STATEMENT FILED [1212268] by David Patchak [Service Date: 10/22/2009] [09-5324] (Bursch, John)
	* * *

10/22/2009	STATEMENT OF ISSUES FILED [1212271] by David Patchak [Service Date: 10/22/2009] [09-5324] (Bursch, John)
	* * *
10/22/2009	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1212312] by Larry Echo Hawk and Kenneth Lee Salazar [Service Date: 10/22/2009] [09-5324] (Avila, Aaron)
	* * *
11/06/2009	MOTION filed [1214675] by Match-E-Be-Nash-She-Wish band of Pottawatomi Indians to dismiss case (Response to Motion served by mail due on 11/23/2009) [Service Date: 11/06/2009 by US mail] Pages: 1-10. [09-5324] (Schulte, Conly)
11/17/2009	RESPONSE IN OPPOSITION FILED [1216190] by David Patchak [Service Date: 11/17/2009 by email] Pages: 1-10. [09-5324] (Bursch, John)
11/20/2009	CORRECTED RESPONSE IN OPPOSITION FILED [1216731] by David Patchak to motion to

dismiss case [1214675-2] [Service Date: 11/17/2009 by email] Pages: 1-10. [09-5324] (Bursch, John)

11/27/2009 REPLY FILED [1217849] by Match-E-Be-Nash-She-Wish band of Pottawatomi Indians to response [Service Date: 11/27/2009 by email] Pages: 1-10. [09-5324] (Schulte, Conly)

01/08/2010 PER CURIAM ORDER filed [SEE ORDER FOR FURTHER DETAILS] [1224629] referring motion to dismiss in part [1214675-2] to the merits panel to which this case is assigned. The Clerk is directed to enter a briefing schedule. Judges Ginsburg, Brown and Griffith [09-5324]

* * *

04/09/2010 APPELLANT BRIEF [1238988] filed by David Patchak [Service Date: 04/09/2010] Length of Brief: 10,640 Words. [09-5324] (Bursch, John)

05/10/2010 APPELLEE BRIEF [1243998] filed by Match-E-Be-Nash-She-Wish band of Pottawatomi Indians [Service Date: 05/10/2010] Length of Brief:

	13,698 Words. [09-5324] (Schulte, Conly)
05/10/2010	APPELLEE BRIEF [1244015] filed by Larry Echo Hawk and Kenneth Lee Salazar [Service Date: 05/10/2010] Length of Brief: 11,562 Words. [09-5324] (Avila, Aaron)
05/17/2010	MODIFIED EVENT FROM FILED TO LODGED--UNOPPOSED MOTION filed [1245244] by National Congress of American Indians to participate as amicus curiae. [Disclosure Listing: Attached] [Service Date: 05/17/2010] [09-5324]--[Edited 05/18/2010 by KRM] (Kanji, Riyaz)
05/18/2010	MODIFIED EVENT FROM FILED TO LODGED--CONSENT AMICUS FOR APPELLEE FINAL BRIEF [1245414] filed by National Congress of American Indians [Service Date: 05/18/2010] Length of Brief: 6968 Words. [09-5324]--[Edited 05/18/2010 by KRM] (Kanji, Riyaz)
05/18/2010	MODIFIED DOCKET TEXT--UNOPPOSED MOTION filed [1245433] by National Congress of American Indians for leave to file

	motion to participate as amicus curiae and brief out of time [Service Date: 05/18/2010] Pages: 1-10. [09-5324]--[Edited 05/18/2010 by KRM] (Kanji, Riyaz)
05/24/2010	MODIFIED EVENT FROM FILED TO LODGED--APPELLANT REPLY BRIEF [1246315] filed by David Patchak [Service Date: 05/24/2010] Length of Brief: 5,362 words. [09-5324]--[Edited 06/04/2010 by KRM] (Bursch, John)
05/25/2010	CLERK'S ORDER filed [1246438] granting motion for leave to file [1245433-2]; The Clerk is directed to file motion to participate as amicus curiae [1245244-2]; granting motion to participate as amicus curiae [1245244-2]; The Clerk is directed to file Amicus final brief [1245414-2] [09-5324]
05/25/2010	PER ABOVE ORDER lodged motion to participate as amicus curiae [1245244-2] is filed [09-5324]
05/25/2010	PER ABOVE ORDER lodged Amicus final brief [1245414-2] is filed [09-5324]

05/25/2010	JOINT APPENDIX [1246707] filed [Volumes: 1] [Service Date: 05/25/2010] [09-5324]
	* * *
06/09/2010	CLERK'S ORDER filed [1249027] scheduling oral argument before Judges HENDERSON, GRIFFITH, RANDOLPH 09/14/2010 AM [09-5324]
06/14/2010	APPELLANT FINAL BRIEF [1249723] filed by David Patchak [Service Date: 06/14/2010] Length of Brief: 10,663 words. [09-5324] (Bursch, John)
06/14/2010	MODIFIED EVENT FROM FILED TO LODGED-- APPELLANT FINAL REPLY BRIEF [1249724] LODGED by David Patchak [Service Date: 06/14/2010] Length of Brief: 5,365 words. [09-5324]-[Edited 06/18/2010 by LMC] (Bursch, John)
06/14/2010	APPELLEE FINAL BRIEF [1249782] filed by Match-E-Be-Nash-She-Wish band of Pottawatomi Indians [Service Date: 06/14/2010] Length of Brief: 13770 Words. [09-5324] (Schulte, Conly)

06/15/2010	APPELLEE FINAL BRIEF [1250002] filed by Larry Echo Hawk and Kenneth Lee Salazar [Service Date: 06/15/2010] Length of Brief: 11,562 Words. [09-5324] (Avila, Aaron)
	* * *
06/21/2010	CORRECTED APPELLANT FINAL REPLY BRIEF [1250796] filed by David Patchak [Service Date: 06/21/2010] Length of Brief: 5,365 Words. [09-5324] (Bursch, John)
	* * *
09/13/2010	PER CURIAM ORDER filed [1265516] granting motion of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians for divided argument on behalf of appellees. [1264294-2] [09-5324]
	* * *
09/14/2010	ORAL ARGUMENT HELD before Judges Henderson, Griffith and Randolph. [09-5324]
	* * *
09/30/2010	TRANSCRIPT [1269179] of oral argument [09-5324]

* * *

01/21/2011	PER CURIAM JUDGMENT filed [1289166] that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings for the reasons in the accompanying opinion. Before Judges: Henderson, Griffith and Randolph. [09-5324]
01/21/2011	OPINION filed [1289167] (Pages: 21) for the Court by Judge Randolph [09-5324]
01/21/2011	CLERK'S ORDER filed [1289169] withholding issuance of the mandate. [09-5324]

* * *

03/07/2011	PETITION filed [1296798] by Appellee Match-E-Be-Nash-She-Wish band of Pottawatomi Indians for rehearing, for rehearing en banc. [Service Date: 03/07/2011 by CM/ECF NDA] Pages: 11-15. [09-5324] (Waxman, Seth)
03/07/2011	PETITION filed [1296811] by Appellees Larry Echo Hawk and Kenneth Lee Salazar for rehearing, for rehearing en banc.

	[Service Date: 03/07/2011 by CM/ECF NDA, US Mail]. Pages: 11-15. [09-5324] (Avila, Aaron)
03/28/2011	PER CURIAM ORDER filed [1300266] denying petition for rehearing [1296811-2], denying petition for rehearing [1296798-2] Before Judges: Henderson, Griffith and Randolph. [09-5324]
03/28/2011	PER CURIAM ORDER, En Banc, filed [1300268] denying petition for rehearing en banc [1296811-3], denying petition for rehearing en banc [1296798-3] Before Judges: Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, Kavanaugh and Randolph. [09-5324]
04/01/2011	MOTION filed [1301307] by Match-E-Be-Nash-She-Wish band of Pottawatomi Indians to stay mandate (Response to Motion served by mail due on 04/14/2011) [Service Date: 04/01/2011 by CM/ECF NDA] Pages: 11-15. [09-5324] (Waxman, Seth)
	* * *
04/14/2011	RESPONSE IN OPPOSITION FILED [1303372] by David Patchak [Service Date: 04/14/2011

by CM/ECF NDA] Pages: 16-20. [09-5324] (Mazzocco, Nicole)

04/18/2011 REPLY FILED [1303654] by Match-E-Be-Nash-She-Wish band of Pottawatomi Indians to response [1303372-2] [Service Date: 04/18/2011 by CM/ECF NDA] Pages: 1-10. [09-5324] (Waxman, Seth)

04/20/2011 PER CURIAM ORDER filed [1304267] Upon consideration of the motion of appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians to stay the mandate, the response thereto, and the reply, it is ORDERED that the motion be denied. Issuance of the mandate will not cause irreparable harm. Before Judges: Henderson, Griffith and Randolph. [09-5324]

* * *

04/28/2011 MANDATE ISSUED to Clerk, District Court [09-5324]

* * *

08/26/2011 LETTER filed [1326670] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ

	of certiorari was filed 8/25/2011 and placed on the docket on 08/25/2011 as No. 11-246. [09-5324]
08/26/2011	LETTER filed [1326674] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed 08/25/2011 and placed on the docket on 08/25/2011 as No. 11-247. [09-5324]
12/14/2011	LETTER filed [1347715] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: The petition for writ of certiorari was Granted on 12/12/2011. [09-5324]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK 2721 6th Street, Shelbyville, Michigan 49344 **Plaintiff,**	)	
v.	)	
DIRK KEMPTHORNE, in his official capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR 1849 C Street, N.W., Washington, D.C. 20240,	)	**CIVIL ACTION NO._____**
and	)	
CARL J. ARTMAN, in his official capacity as ASSISTANT SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS 1849 C Street, N.W., Washington, D.C. 20240, **Defendants.**	)	

VERIFIED COMPLAINT

Plaintiff David Patchak ("Plaintiff" or "Mr. Patchak") brings this action against Defendants Dirk Kempthorne, Secretary of the United States Department of the Interior, and Carl J. Artman, Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs, and states as his Complaint as follows:

I. JURISDICTION AND VENUE

1. Plaintiff brings this action under sections 5 and 19 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 465, 479. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331, as an action arising under the laws of the United States. This Court may issue declaratory relief and reverse, delay, or postpone Defendants' actions or otherwise issue an injunction under 28 U.S.C. § 2201 and 5 U.S.C. §§ 702, 705.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

II. PARTIES AND STANDING

3. Plaintiff David Patchak has lived in a rural area commonly referred to as Shelbyville, more formally known as Wayland Township, Michigan, at all times pertinent to this action.

4. Defendant Dirk Kempthorne is the Secretary of the United States Department of the Interior, an administrative agency of the United States, and is sued in his official capacity.

5. Defendant Carl J. Artman is Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs, an administrative agency of the United States, and is sued in his official capacity.

6. Defendants' actions threaten to injure Plaintiff in a way that is different from the citizenry at large, since he will be exposed to and injured by the negative effects of building and operating a massive casino in his community.

7. Plaintiff's injuries and grievances have been caused, facilitated, or made possible by the activities that form the basis of this Complaint, and will be redressed by a ruling in Plaintiff's favor. Plaintiff s interests fall within the zone of interests protected by the laws sought to be enforced in this action.

III. STATEMENT OF FACTS

8. The United States Department of the Interior ("DOI") and the Bureau of Indian Affairs ("BIA") (collectively, "Defendants") have unlawfully approved placing into trust approximately 146 acres of land in rural Wayland Township, Michigan, ("the Property") for use by the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Gun Lake Band") to construct and operate a nearly 200,000 square-foot casino complex.

9. A long time resident of Shelbyville, Plaintiff is in close proximity to the land that Defendants propose to take into trust for a casino. Mr. Patchak moved to the area because of its unique rural

setting, and values the quiet life he leads in Wayland Township. He fears that the construction and operation of a huge casino would destroy the lifestyle he has enjoyed. Mr. Patchak will be disproportionately affected if the Property is placed in trust and the Gun Lake Band follows through with its plans to build a 200,000-square-foot casino complex that is anticipated to draw more than 3.1 million visitors a year. Such a casino would detract from the quiet, family atmosphere of the surrounding rural area. Among the negative effects of building and operating the anticipated casino in Mr. Patchak's community are: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.

10. Defendants have no authority to place the Property into trust for the Gun Lake Band because the Indian Reorganization Act of 1934 ("IRA") only permits land to be taken into trust for Indian tribes that were federally recognized as of June 1934, when the IRA was enacted. The Gun Lake Band was not federally recognized in June 1934. Therefore, Defendants' unlawful and *ultra vires* decision must be

reversed and an injunction entered to prevent the placement of the land into trust.

A. The Stay Which Thus Far Has Prevented Defendants from Taking the Property Into Trust Will Expire On August 1, 2008

11. Upon information and belief, Defendants have thus far refrained from taking the Property into trust due to the March 5, 2007 stay ordered by Judge Penn in *MichGO v. Kempthorne*, ("the MichGO case"), preventing them from doing so until "the merits of MichGO's claims have been decided on appeal by the United States Court of Appeals for the District of Columbia Circuit." (March 5, 2008 Order at 6-7)

a. On April 29, 2008, the United States Court of Appeals for the District of Columbia Circuit issued a *per curiam* opinion affirming summary judgment against MichGO on its claims that (1) DOI's approval of the proposed Gun Lake Band casino complex violated the National Environmental Protection Act ("NEPA"), and (2) Section 5 of the Indian Reorganization Act ("IRA") was unconstitutional in violation of the nondelegation doctrine. Judge Janice Rogers Brown filed a 13-page dissent, stating her opinion that Section 5 of the IRA is unconstitutional.

b. MichGO filed a petition for rehearing en bane on May 13, 2008. The Court issued a *per curiam* Order on July 25, 2008 denying the petition for rehearing en bane. Chief Judge Sentelle and Judges Brown and Griffith indicated that they would have granted the petition.

c. MichGO, intending to appeal the decision against it to the United States Supreme Court, asked Defendants to refrain from taking the Property in trust pending conclusion of the litigation, but Defendants rejected that request, stating that they intended to proceed with the land acquisition after the mandate issues.

d. Upon information and belief, the United States District Court for the District of Columbia's mandate will issue on Friday, August 1, 2008, at which point the Defendants intend to take the Property into trust for the Gun Lake Band.

12. Once the land is placed in trust, legal and practical hurdles will make it virtually impossible to challenge Defendants' decision and the casino's legality:

a. The Department of Interior has successfully argued that the Quiet Title Act, 28 U.S.C. § 2409a(a), bars any suit to challenge a land-in-trust acquisition - or any other claim relating to Indian lands - once the land has been taken into trust. *See Neighbors for Rational Devel., Inc. v. Norton*, 379 F.3d 956, 961-62 (10th Cir. 2004). Plaintiffs' claim will therefore be irrevocably lost if an injunction is not issued to prevent the land from being taken into trust pending the outcome of the litigation.

b. Once gambling operations begin, neither Plaintiffs nor the State of Michigan will be able to sue the tribe directly because of tribal sovereign immunity. *See, e.g., Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999).

13. Plaintiff's remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury.

14. It is essential to preserve the status quo and prevent irreparable harm to Plaintiffs by preventing the taking of any land into trust pending adjudication of Plaintiff s claim.

B. The Gun Lake Band's Trust Application and Defendants' Land-Into-Trust Decision

15. The Gun Lake Band descends primarily from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish during the late 1700s and early 1800s, when they lived in villages along the Kalamazoo River, in and around what is now Kalamazoo, Michigan. The Gun Lake Band was initially recognized as a tribe by the federal government early in its history, and was a party to 16 treaties with the U.S. government between 1795 and 1855 which the Band negotiated as an independent sovereign.

16. In 1870, the Gun Lake Band discontinued its compliance with its 1855 treaty by moving from Oceana County to Allegan County. 62 Fed. Reg. 38,113 (1997). At that time, the Band received its last annuity-commutation payment from the federal government under the treaty. *Id.*

17. For the next 128 years, the federal government did not recognize the Gun Lake Band as a sovereign Indian tribe.

18. In the mid-1990s, the Gun Lake Band applied to regain its federal recognition through the DOI's formal recognition procedure. The United States formally recognized the Gun Lake Band in October 1998. 63 Fed. Reg. 56936-01 (1998).

19. After receiving federal re-recognition, the Gun Lake Band decided to acquire lands on which to build a casino. The Band looked at several sites in Allegan County, Michigan before choosing a two-parcel tract totaling approximately 146 acres in rural Wayland Township.

20. On August 8, 2001, the Gun Lake Band submitted an application asking the United States to acquire the Wayland Township property, known as the Bradley Tract, and set aside the land in trust for the benefit of the Tribe to construct and operate a casino complex.

21. On May 13, 2005, Defendants published a Notice of Final Agency Determination, announcing their decision to accept the Gun Lake Band's application and place the land into trust to "be used for the purpose of construction and operation of a gambling facility." 70 Fed. Reg. 25596 (2005). In the Notice, Defendants expressly cited IRA Section 5 as providing the statutory authority to take the land into trust. *Id.*

C. The Indian Reorganization Act Only Affords Protection to Indian Tribes Which Enjoyed Federal Recognition as of June 1934.

22. Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, permits Defendants to

take land into trust for "Indians." Section 19 of IRA in turn limits "Indians" to "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. As the United States Supreme Court has stated, Section 19 thus applies to tribes that were federally recognized "in 1934." *United States v. John*, 437 U.S. 634, 650 (1978). The text of Section 19 has not changed since its enactment in 1934.

23. The Gun Lake Band was not a federally recognized tribe in June 1934, when the IRA was enacted. Indeed, BIA has determined that the Band's federal acknowledgement ceased in 1870. 62 Fed. Reg. 38,113 (1997).

24. The Gun Lake Band admitted in a brief recently filed before the United States Court of Appeals for the District of Columbia Circuit that "the federal government withheld formal acknowledgement beginning in 1870. . . . Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue communal self-determination and self-sufficiency." (Br. for Def.-Appellee Match-E-Be-Nash-She Wish Band of Pottawatomi Indians in *MichGO v. Kempthorne*, at 3.)

CAUSE OF ACTION

Declaratory Judgment and Injunctive Relief, 5 U.S.C § 702

25. Plaintiff incorporates by reference and realleges Paragraphs 1 - 24 as if fully set forth herein.

26. The IRA limits Defendants' power to take land into trust only for Indian tribes that were federally recognized in June 1934, when the IRA was enacted. 25 U.S.C. §§ 465, 479.

27. The Gun Lake Band was not a federally recognized Indian tribe in June 1934.

28. Since the Gun Lake Band was not federally recognized in June 1934, Defendants have no power to grant the Gun Lake Band's trust application and take the land into trust for the benefit of the Gun Lake Band. Indeed, Defendants' approval of the trust acquisition violates §§ 5 and 19 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 465, 479 and is *ultra vires*.

29. One Federal Circuit Court - the First Circuit, in *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) - has held that the IRA does not necessarily prevent transfers-in-trust to Indian tribes not federally recognized by June 1934. However, the United States Supreme Court recently granted the State of Rhode Island's petition for certiorari in that case and will review that decision. *See* No. 07-526, 2008 WL 482033 (Feb. 25, 2008). Specifically, the Supreme Court granted certiorari to decide "[w]hether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." *Id.*

30. If the Supreme Court rules in Rhode Island's favor on this question, the decision will be dispositive here because it is undisputed that the Gun Lake Band lost its federal recognition long before enactment of the IRA.

31. Plaintiff is entitled to judicial review of Defendants' unlawful actions under the APA. *See* 5 U.S.C. §§ 702 and 706.

32. Plaintiff's remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury. In the absence of the relief requested in this action, the approximately 146 acres of land will be irretrievably lost and an unlawful casino complex allowed to open and operate in Wayland Township.

33. Because the Supreme Court's decision in *Carcieri v Kempthorne* will, in all likelihood, resolve the sole legal issue that is the subject of this Complaint, this Court should enjoin Defendants from taking the approximately 146 acres into trust and stay any future proceedings in this Court pending a decision in *Carcieri v Kempthorne*.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

(A) That the Court find the action of Defendants unlawful and reverse the decision to take the Property into trust for the Gun Lake Band;

(B) That the Court issue a declaratory judgment declaring that Defendants' decision to take the Property into trust violates Sections 5 and 19 of the Indian Reorganization Act, 25 U.S.C. §§ 465, 479, and is *ultra vires*;

(C) That the Court issue an order staying the action of Defendants and/or issuing a preliminary injunction prohibiting the acceptance or transfer of any land into trust for the benefit of the Gun Lake Band, effective immediately and pending litigation of the issues raised in this Complaint;

(D) That the Court issue a permanent injunction prohibiting Defendants from accepting or transferring any land into trust for the benefit of the Gun Lake Band;

(E) That the Court award to Plaintiff all of his costs and reasonable attorney fees; and

(F) That the Court award such other relief as it deems proper to effectuate the purposes of this action.

Dated: August 1, 2008

Respectfully submitted,

/s/

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VERIFICATION

I, David Patchak, Plaintiff in this action declare and affirm under penalty of perjury that the foregoing is true and correct.

Executed On: July 31, 2008

/s/ David Patchak
David Patchak

GUN LAKE FEE-TO-TRUST APPLICATION

I. INTRODUCTION

By Resolution dated July 31, 2001, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan (hereinafter the "Tribe" or "MBPI") has requested that the Department of the Interior accept trust title to land located in Allegan County, Michigan.[1] Given the Tribe's expanding population base, and lack of any reservation land, trust status for this Property is requested in order for the Tribe to acquire property on which it plans to conduct gaming, which will generate revenue necessary to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs.

A. PROFILE OF THE MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS OF MICHIGAN

The Pottawatomi have been distinguished from kindred and neighboring Tribes by their named identity, their distinctive language, their own traditional history of separation from the ancestors of the modem Chippewa and Ottawa, their claims to a territory that expanded increasingly in size up to the time of American settlement in the Great Lakes region, and particularly by a tribal political

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[1] The Tribe has been known by several names: The Gun Lake Tribe; Pennassee's Band; The Bradley Settlement Indians; The Griswold Colony Indians; and the Match-e-be-nash-she-wish Band. The Resolution is attached hereto as Exhibit 1.

organization based upon a disbursed clan structure. They also had differences of dress, folklore, ritual, and other aspects of their culture that marked them as distinctive, although their cultural patterns were essentially similar to those of their Central Algonquian neighbors. Boundaries between the Pottawatomi and other communities were quite permeable: their many villages often contained numerous representatives from other societies, particularly the Chippewa and Ottawa. *15 Handbook of North American Indians*, 725, Smithsonian Institution (1978).

By 1800, the Pottawatomi had already participated in 2 treaties with the United States, those of Fort Harmar in 1789 and Greenville in 1795. Beginning in 1803 they were to sign or participate in 52 more treaties, ending with the establishment of the Citizens Band of Pottawatomi in Oklahoma in 1867.

MBPI descends primarily from the Pottawatomi Band led by Chief Match-E-Be-Nash-E-Wish which was assigned a 3 mile square reserve at Kalamazoo, Michigan by federal treaty in 1821.[2] It also has considerable descent from Grand River Ottawa dating to the period from 1838 through 1855, during which it was associated with the Episcopalian Griswold Mission in Allegan County, Michigan, which received its funding through the 1836 Ottawa Treaty. Historically, the Antecedent Band was always small, consistently under 200 persons. During the Griswold Mission, it was enumerated on annuity rolls, on the 1842 and 1847 Office of Indian Affairs

[2] Treaty of Chicago of August 29, 1821 (7 Stat. 288).

Censuses of Michigan Indians, and on the 1850 Federal Census as an Indian settlement.[3]

Under the terms of the Treaty of 1821, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan was granted a federal reservation in the form of a 3 mile square tract of land located at Kalamazoo, Michigan.[4] This reserve, however, was ceded by the Pottawatomi in the Treaty of 1827, in return for an enlargement of the Nottawaseppi Reserve.[5]

By the terms of the 1827 Treaty, the Pottawatomi ceded 4 of the 5 reserves granted them in the Chicago Treaty of 1821. They retained the Nottawaseppi Reserve and were granted an additional tract of land adjacent to the north and west of the remaining reserve. There is no indication in the contemporary historical record that Match-E-Be-Nash-She-Wish's Band ever actually removed from Kalamazoo to the "99 sections" (the Nottawaseppi Reserve and the aforementioned additional tracts of land) between 1827 and 1833.[6]

The 1833 Treaty of Chicago, Illinois, between the United States and the "United Nation of Chippewa, Ottowa [sic], and Potawatamie [sic]" ceded approximately 5 million acres. The articles

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[3] Historical Technical Report, MBPI (Historical Report), Bureau of Indian Affairs, 1998, page 1. (Hereinafter, "BAR Historical Report") (attached as Exhibit 2)

[4] Treaty of Chicago of 1821 (7 Stat. 288).

[5] Treaty with the Potawatomi, 1827 (7 Stat. 305).

[6] BAR Historical Report at 13 (quoting *Kappler* 1972, 2:283-284).

supplementary to the 1833 Treaty ceded the reservation at Nottawaseppi[7], the 99 sections of land contained in the Treaty made at St. Joseph, on the 19th day of September, 1827 and approximately 49 sections of land on the St. Joseph River.[8] Ironically, the Treaty that had the greatest effect on the Tribe was one to which they were not a direct party: The Ottawa Treaty of 1836.[9]

B. HISTORICAL USE AND OCCUPANCY OF THE SUBJECT PROPERTY

The property is located within an area identified as "Royce Area 117."[10] See, generally, proceedings before the Indian Claims Commission. The MBPI occupied lands including the "Bradley Property" or "Griswold Colony" located within the exterior boundaries of the 1821 Treaty (Royce Area 117). Under this land cession, the Pottawatomi ceded approximately 4 million acres lying: south of the north bank of the Grand River, north of the south

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[7] Treaty of September 26, 1833 (7 Stat. 431).

[8] *Kappler* 1972, 2:410.

[9] Under the Tenth Article of the of the Treaty "Pennasee or Gun Lake" was paid as a chief of the third class - which led to the bands avoidance of forcible removance from Michigan to lands west of the Mississippi, like most other Pottawatomi Bands. Instead, the Tribe came under the protection of a Episcopalian mission and remained where they are to this day, in Allegan County, Michigan.

[10] This label is from a schedule of Indian land cessions and maps compiled by Charles C. Royce and published in the Eighteenth Annual Report of the Bureau of American Ethnology. Part 2, 1896-97. The Royce maps have been widely accepted as historically accurate and authoritative documents reflecting lands ceded by Indian Tribes.

bank of the Saint Joseph, east of the eastern shore of Lake Michigan and west of the boundaries of the Detroit and Saginaw Treaties.

The Indian Claim Commission and United States Court of Claims held, as a matter of law, that the Pottawatomi's held "Indian title" (Aboriginal title) to Royce area 117. See 6 Ind. Cl. Comm. 414-463(1958), rev'd and remand, 180 Ct Cl. 477(1948). on remand, 27 Ind. Cl. Comm. 187-194, 250-251A, 280, 323-324(1972) (holding that the United States regarded the Pottawatomi Tribe as a single nation and not bands or sub-groups thereof in obtaining the major cessions of Pottawatomi lands).

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians were parties to the following treaties:

1. The Greenville Treaty of August 3, 1795 (7 Stat. 49).
2. Treaty of Fort Industry of July 4, 1805 (7 Stat. 87).
3. Treaty of Detroit of November 17, 1807 (7 Stat. 105).
4. Treaty of Chicago of August 29, 1821 (7 Stat. 288).
5. Treaty of July 29, 1829 (Prairie Du Chien) (7 Stat. 320).
6. Treaty of September 29, 1817 (7 Stat. 160).
7. Treaty of October 2, 1818 (7 Stat. 185).
8. Treaty of October 16, 1826 (7 Stat. 295).
9. Treaty of September 19, 1827 (7 Stat. 305).
10. Treaty of September 20, 1828 (7 Stat. 317).
11. Treaty of October 20, 1832 (7 Stat. 378).

12. Treaty of October 26, 1832 (7 Stat. 394).
13. Treaty of October 27, 1832 (7 Stat. 399).
14. Treaty of September 26, 1833 and Articles supplementary of September 27, 1833 (7 Stat. 431, 442) (Treaty of Chicago of September 26, 1833 by which the United Nation of Chippewa, Ottawa, and Pottawatomi ceded to the United States Royce Area 187 in Illinois and Wisconsin containing about 5 million acres bordering the western shores of Lake Michigan. On September 27, 1833, by Articles supplementary thereto, the Chiefs and Headmen of the said United Nations of Indians residing on their reservations in Michigan south of Grand River ceded all of their land situated in the Territory of Michigan south of Grand River. This cession included the reservation at Notawasepe of 4 miles square and 99 sections, and about 49 sections of land on the St. Joseph River on which Topenebee's and Pokagan's villages were situated.
15. Treaty of September 20, 1836 (7 Stat. 513).
16. Treaty of July 31, 1855 (11 Stat. 621).

The relocation of Match-E-Be-Nash-She-Wish's Band to Allegan County, Michigan is well documented in the Bureau of Acknowledgment and Recognition's historical report:

"According to Clifton, during the summer of 1840, most of the southwestern Michigan Pottawatomi, with the exception of the Catholic Bands who claimed specific exemption under the

Treaty of 1833, were forcibly removed west of the Mississippi by the United States Army, under General Hugh Brady. Many avoided removal by going to Canada, but others were intercepted by American troupes on the way. However, the two northernmost Bands that had received 1821 Treaty reserves, those of Sagamah and Match-E-Be-Nash-She-Wish, avoided removal of their Bands through a different technique. Between 1828 and 1838, they had already moved north of the Kalamazoo River. In 1839 or very shortly thereafter, they placed themselves under the protection of an Episcopalian Mission in Allegan County, Michigan, which was funded by the provisions of the 1836 Ottawa/Chippewa Treaty. Basically, they went to ground among the Grand River Ottawa, with whom their history would be closely associated for the next 30 years."[11] The precise date of the arrival of the Match-E-Be-Nash-She-Wish's Band at Griswold Colony is not known, but it must have been shortly before 1838."[12]

The history of the Griswold Colony has been exhaustively researched for purposes of the Tribe's Petition for Recognition. Briefly, in 1840 the Reverend Samuel A. McCoskry purchased and patented approximately 160 acres of land in his name within the southeast quarter of section 20, Allegan County, Michigan. Prior to that purchase, 200 acres were purchased in section 28 of Allegan County, Michigan in 1837 by Sarah W. Weaver. Funds to

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[11] BAR Historical Report at 15 (citations omitted).

[12] Id. at 20.

purchase land for the Griswold Colony were derived from annuities provided under the Treaty of 1836.[13]

In 1837, Indian Agent Henry R. Schoolcraft added Bishop McCoskry's name to the list of the names of persons authorized to receive funds for Indian Missions and schools within the State of Michigan. "He (McCoskry) designated the Reverend James Selkirk, who was already in charge of an Episcopalian Parish at Niles in southwestern Michigan, to be the missionary. . . . An Episcopalian Mission near Wayland, known as Griswold Colony, was also founded in 1838 after funds for education and missions became available under the Treaty of 1836."[14]

Funding for the Griswold Colony, as well as other missions established under the 1836 Ottawa/Chippewa Treaty, had been set for a period of 20 years. It was thus due to expire in 1856, leading the office of Indian Affairs to conduct a new Treaty with the Ottawa Indians of Michigan in 1855. "The historian of the Griswold Colony for the Episcopal Diocese of Michigan concluded that the end of the Federal subsidy meant the end of the mission: In 1855 the assistance provided by the Treaty of 1836 came to an end and a new Treaty was made with the Indians whereby they were granted outright ownership of lands in Oceana County near Pentwater, Michigan. The majority of the Griswold Indians took advantage of the provisions of the new Treaty and moved northward. A few families,

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[13] Id. at 31.

[14] Id. at 17.

however, appeared to have remained; they had their own homes and were probably reluctant to leave. The land at Griswold was still theirs; for Bishop McCoskry considered that he held it in trust for them, not as the property of the church. . . . "with this exodus of the Indians the effective work of the Griswold Mission came to an end", however, the Reverend Selkirk did not leave Wayland Township nor was the mission land disposed of at this time. The ensuing developments were more complex. Krusen mentioned the allotments under the 1855 Treaty and did state that "within 10 years, however, most of the Griswold Indians had lost their lands in Oceana County, and many had returned to the mission grounds" (Krusen 1948, 669).[15]

On July 26, 1855, in Wayne County, Michigan, Bishop McCoskry made a "trust statement" concerning the Mission's land, which was recorded in Allegan County, Michigan, on September 5, 1855:

> I do hereby declare that I do hold the same accordingly in trust for the benefit of the Band of Ottawa Indians formerly under the Chief Saginaw afterwards under the Chief Penassee and now under the Chief called Shopquaung in manner following that is to say I hold the same for the occupation and improvement thereof by said Band in such individual allotments as I shall find advisable and I agree to make such allotment in occupancy and not in fee simple as generally and equitably as possible and in the case said Band shall hereafter desire to remove from said land to another place, I am at liberty to sell

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[15] Id. at 31.

said land and reinvest the proceeds for the same purpose it being the purpose of this trust to manage and administer said lands and the proceeds thereof to the best of my discretion for the benefit of said Band and for no other purposes whatever.[16]

In 1874, the State of Michigan began to tax the Griswold Mission Land. The Title and Trust of the Griswold Mission Land, or "Bradley Colony" was in the name of Samuel Alan McCoskry, the Episcopalian Bishop, who purchased land in 1838 and continued to hold the trust since 1855. In 1878, McCoskry resigned his position as the Episcopal Bishop. In 1894, Bishop McCoskry resigned his Trust to the Circuit Court of Allegan County, and the mission land was divided into panels and deeded to nineteen descendents of the original Match-E-Be-Nash-She-Wish Band. Within a few years practically all of the Tribal members had lost their land to white men by failure to pay their taxes.[17]

Between 1870 and 1904, the Tribe's ancestors continued to reside on the lands of the former Griswold Mission, which was referred to as an "Indian Colony" in the 1880 Federal Census of Allegan County, Michigan.[18] In 1904, members of the Bradley Settlement were included on the "Taggart Role" compiled by the Bureau of Indian Affairs for distribution of the Congressional appropriations to settle claims of Michigan's

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[16] Id. at 30 (citing Allegan County, MI, Liber 13,205).

[17] See account generally, Id. at p. 40-43.

[18] See Genealogical Technical Report of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan at 19. (Included in Exhibit 2).

Pottawatomi Indians.[19] In 1908, as the descendents of Shau-Be-Quo-Ung's Band, the group's members were also included on the Durant Role, a role compiled by the BIA for distribution of a Congressional appropriations to settle claims of Michigan's Ottawa Indians. Because the Band had no commonly owned reservation land, the Band was ineligible to organize under the Indian Reorganization Act of 1934. In 1939, the Allegan County Settlements were included in the BIA's "Holst Report" and suffered from the Commissioner of Indian Affairs' 1940 decision to not extend the BIA's services to the Indians of Michigan's lower peninsula.[20]

At sometime in the later part of the 1800's, the MBPI Settlement at Bradley, Michigan, changed its allegiance from Episcopal to Methodist. "The first appearance of the Methodist Indian Mission at Bradley in Michigan Conference Records was in 1882, on a circuit with Wayland & Moline."[21] Newspaper articles published from the early 1900's to the present have described the Tribe and their ancestors in Allegan County, Michigan. Some articles specify that the current group ascends from the Historical Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. Since World War II to the present, younger members of the Tribe have moved away from the Bradley Settlement Area, also known as the Griswold Colony, to nearby urban areas in search of housing and employment. The majority of the young

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[19] See 27 Ct.Cl. 403 (1892).

[20] Id. at 1-2.

[21] BAR Historical Report at 44.

immigrants relocated to Grand Rapids or Kalamazoo, both approximately 30 miles from the Bradley Settlement. Several members of the Tribe still reside near Bradley, Michigan.

C. IDENTIFICATION OF PROPOSED TRUST LAND

The land sought to be acquired in trust is comprised of two separate parcels, both of which are to be used for gaming purposes. The full legal description of the parcels is attached as Exhibit 3, and is also described in the Tribe's Resolution at Exhibit 1.

II. STATUTORY AND REGULATORY REQUIREMENTS

A. REQUIREMENTS OF 25 C.F.R. PART 151

Section 10 of 25 C.F.R. part 151 provides a list of factors which the Secretary shall consider in evaluating a request for the acquisition of land into trust status.

1. 25 C.F.R. § 151.10(a) – Statutory Authority for Acquisition of the Property

The statutory authority for the acquisition of land in trust for Indian tribes by the Secretary of Interior is found at 25 U.S.C § 465. Section 465 provides, in relevant part:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or

assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year:

...

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

In addition, the Secretary of the Interior has promulgated regulations which set forth the authorities, policy and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes at 25 C.F.R. Part 151. 25 C.F.R. Part 151.3 (a) provides:

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the

> exterior boundaries of the Tribe's reservation or adjacent thereto, or within a tribal consolidation area: or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Section 5 of the IRA authorizes the Secretary to acquire land in trust for Indians and Indian tribes: (1) within or adjacent to an Indian reservation; or (2) for purposes of facilitating tribal self determination, economic development or Indian housing.

As previously set forth in this application, the land is located within the area that has been determined to be the aboriginal lands used and occupied by the Tribe. In addition, acquisition of the subject land is necessary to facilitate tribal self determination and economic development. Accordingly, the land may be acquired for the Tribe in trust status pursuant to 25 C.F.R. § 151.3(a)(3).

Additional statutory authority for the acquisition of the subject property is found in 25 U.S.C. § 467, which provides as follows:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by Sections . . . 465 . . . of this title, or to add such lands to existing reservations: provided, that lands added to existing reservations shall

be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to reside at such reservations.

2. 25 C.F.R. § 151.10(b) – The Tribe's Need for Additional Land

a. In General

The Department of the Interior's policy with respect to the acquisition of land for Indians is set out in 25 C.F.R. § 151.3, which provides in pertinent part, "land may be acquired for a Tribe in trust status . . . when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." In the present case, the acquisition of the subject properties will unquestionably enhance tribal self-determination and economic development.

In 1999, the MBPI was federally recognized as an Indian Tribe after seeking federal acknowledgment under part 83 of title 25 of the Code of Federal Regulations. The Tribe has neither land in trust nor a reservation. Thus, land is needed by the Tribe for housing, Tribal operations and economic development. The parcels that are the subject of this Trust Application shall be part of the Tribe's initial reservation. The Tribe intends to submit a separate fee-to-trust application to place land into trust for housing and tribal operations.

For over twenty-five (25) years the federal government has actively pursued a policy of encouraging tribal self-determination. Congress has

declared that "a principle goal of Federal Indian Policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701. Acquiring the subject property in trust for the Tribe will undoubtedly further these principle goals of Federal Indian Policy.

b. *Trust Status is a Prerequisite to Eligibility for Federal Economic Incentives and Programs*

Trust status will make the proposed economic development eligible for several federal economic incentives and programs which would not be available if the activities were to occur on land owned by the Tribe in fee status. As described in further detail below, such economic incentives and programs include accelerated depreciation, Indian employment tax credits, tax exempt private activity bonds, and grants and services made available under the Indian Business Development Program.

(1) Accelerated Depreciation, 26 U.S.C. § 168(j).

26 U.S.C. § 168(j) permits an accelerated depreciation deduction from federal income taxes for property used in a trade or business located on trust land. See 26 U.S.C. § 168(j)(6)(B)(incorporating the definition of "Indian Reservation" from 25 U.S.C. § 1903(10), which includes "lands held by the United States in trust for the benefit of any Indian tribe . . . "). For example, property that ordinarily would be deducted over a 20-year period can be deducted over a 12 year period if the business is located on trust land. Congress intended that this provision

stimulate Tribal economic development by making it advantageous to locate business activities on trust lands. By placing the Property in trust, the Secretary will be furthering the Congressional policy.

(2) Indian Employment Credit, 26 U.S.C. § 45A.

26 U.S.C. § 45A provides a federal income tax credit for wages and health insurance paid by an employer to a member of an Indian Tribe. The credit is only available if the services performed by such Tribal member/employee are performed on an "Indian Reservation." For purposes of section 45A, the term "Indian Reservation" includes land held in trust by the United States for the benefit of an Indian tribe. See 26 U.S.C. § 45A(c)(7). This provision was intended to promote tribal economic development and self-sufficiency by providing an incentive to both tribal and non-tribal employers to gainfully employ tribal members. Thus, by approving the present Trust Application, the Secretary will be furthering the Congressional policy of promoting tribal economic development and self-sufficiency.

(3) Interest Exemption for Private Activity Bonds, 26 U.S.C. § 7871(c)(3).

26 U.S.C. §7871(c)(3) provides that interest on bonds issued for certain facilities located on qualified Indian lands is not considered income for federal tax purposes. In order to qualify under this section, the facility must be located "on land held in trust by the United States for the benefit of an Indian Tribe." 26 U.S.C. § 7871(c)(3)(E). Again, Congress enacted this

provision in order to encourage and facilitate tribal *economic development and self-sufficiency*; by approving the present Application, the Secretary will be carrying out these Congressional policies.

(4) Eligibility for Indian Business Development Program Grants.

Congress has made grants available to Indian tribes under the Indian Business Development Program, 25 U.S.C. § 1521, *et seq.*, "to stimulate and increase Indian entrepreneurship and employment by providing equity capital . . . to Indian tribes to establish and expand profit-making Indian-owned economic enterprises on or near reservations." While these grants are available for activities on fee lands near reservations, the regulations implementing the *Program require the Secretary to assign lower* priority to enterprises located on fee lands than to enterprises located on reservation or trust lands. See 25 C.F.R. § 286.8. *Accordingly, if the present trust* application is granted, the Tribe will have a greater chance of obtaining capital for economic development on the Property through the Indian Business Development Program.

3. <u>25 C.F.R. § 151.10(c) – Purposes for Which the Land Will Be Used</u>

The subject property is located at 1123 129th Avenue, Wayland Township, Allegan County, Michigan. The two parcels combined approximate 165 acres. Three structures are situated on the subject property. The structures include one 192,945 square foot industrial building, one three-story farmhouse and one single story barn. The industrial

building was utilized for the Ampro Industries, Inc's. operations. A manufacturing plant is situated along the south portion of the subject property. The building consists of a concrete foundation, slab concrete floors, with steel truss and sheet metal siding. Office areas are located in the southeast portion of the building and are finished with carpeting, floor tile, painted walls and ceiling tiles. Other small offices are also located throughout the warehouse area of the building. The plant operation generally consisted of the use of recycled newspaper in the manufacturing of products for the landscaping industry. The remaining areas of the warehouse consist of storage areas, shipping and receiving areas, 15 loading docks, two dye rooms, storage rooms, a maintenance room, break rooms, air-compressor rooms, two electrical rooms, and restrooms.

A farmhouse is located west of the industrial building on the south side of the subject property. This two-story farmhouse has a basement as well as an attic. The entire house has been remodeled and consists of office areas, restrooms, a sauna, weight room, tanning room and storage rooms. The single-story barn is located in the northwest portion of the property. The barn is constructed of wood with metal siding. The interior of the barn has a concrete floor. The barn has been used for storage purposes only.

The external areas of the property consist of asphalt parking areas, driveways, concrete loading areas, gravel and grass areas. Two ponds are situated on the subject property. One of the ponds is located directly south of the industrial building near the farmhouse, while the other is located north of the

industrial building. Access to the subject property is provided by one asphalt driveway located along the southeastern property boundary. This driveway provides access onto 129th Avenue and traverses the eastern and southern perimeters of the industrial building. The asphalt drive turns into a gravel driveway that provides access around the west and southwestern perimeter of the industrial building. Many exterior areas consist of asphalt parking areas, concrete loading areas, landscape, grass and gravel. Utilities available to the subject property include three private water wells, two septic tanks, drain field systems, electrical, and gas. A weigh station is located to the east of the industrial building. The weigh station consists of one electrically operated scale. A back-up generator, propane tank and transformer are also located along the east exterior wall of the building.

Historically, the subject property has been utilized in an agricultural capacity. The farmhouse and associated out-buildings (including the barn) occupy the sections of the site along 129th Street where currently, the industrial plant is located. The farmhouse is estimated to be approximately 100 years old, but has been extensively renovated. Former out-building were razed or moved to allow for construction of the first phase of the industrial plan in 1994. The surrounding property has been used in the past for residential and agricultural purposes, and/or has been largely undeveloped.

The Tribe intends to use the land as part of its initial reservation and plans to renovate the existing Ampro industrial building into a gaming facility. The

Tribe intends to offer Class II and/or Class III gaming (as defined by the IGRA, 25 U.S.C. § 2701 *et seq.*) to the public at the facility.

The subject property is currently owned in fee simple absolute by P.C.S. Acquisition Company, L.L.C. of Michigan. P.C.S. Acquisition Company, L.L.C. intends to transfer the property to escrow. The escrow instructions shall provide that upon approval of the Secretary of the Interior of this fee-to-trust request, the parcels will be transferred from P.C.S. Acquisition Company, L.L.C. to the Tribe, and from the Tribe to the United States to be held in trust for the benefit of the Tribe. The escrow instructions will be provided as a supplement to this application. Attached as Exhibit 4 to this application is a land title survey location map. Attached as Exhibit 5 is a copy of a warranty deed for the subject property in the name of P.C.S. Acquisition Company, L.L.C.

4. **25 C.F.R. § 151.10(e) – The Impact on the State and its Political Subdivision Resulting from the Removal of the Land from the Tax Rolls**

The taxable value the land is $194,527.00 with a Michigan State equalized value of $196,400.00. According to the year 2000 winter tax bills the combined parcels were assessed in the amount $45,082.28. See, Exhibit 6. Accordingly, the impact on the state and its political subdivisions resulting from the removal of the property from the tax rolls is approximately $45,0820.20 per year. The Tribe submits that this impact will be more than mitigated

by the job creation and public revenues that the gaming facility will provide.

5. **25 C.F.R. § 151.10(f) – Jurisdictional Problems and Potential Conflicts of Land Use Which May Arise**

The Allegan County Sheriff's office provides law enforcement services to the subject property. The Tribe has had several meetings with Mr. Blaine A. Koops - Sheriff of Allegan County. As a result of those meetings, the Sheriff's office has informed the Tribe that it is willing to negotiate an operational service agreement by which general law enforcement services will be provided to the Tribe's gaming facility and the immediate surrounding area. See, Exhibit 7 - a "Will-Serve" letter from the Allegan County Sheriff's office. During a meeting held on July 27, 2001 between officials of the Allegan County Sheriff's office and the Tribe, the parties discussed provisions that will be included in a service and cross-deputization agreement including, but not limited to the following: scope of deputization, fresh pursuit, operational plans and protocol, execution of arrest warrants, immunity and insurance, consent to entry, service of process; and, the convening of an oversight committee consisting of members of the Allegan County Sheriff's office, the Tribe's public safety director, and gaming facility security officials.

The costs associated with providing law enforcement services to the Tribe is presently being determined by the Allegan County Sheriff's office. The Tribe intends to pay for the law enforcement services under a contract between the Tribe and the

Allegan County Sheriff's office, in order to mitigate any impact on the surrounding community. The Tribe and Sheriff's office have exchanged drafts of proposed service and cross-jurisdictional agreements. The final agreements will be provided as a supplement to this application.

With regard to fire protection, tribal officials met with Mr. Hugh DeWeerd, Wayland Township Fire Chief, on July 26, 2001. Mr. DeWeerd explained the at the fire department has a contract to provide fire protection services to Wayland City, which currently provides fire protection to the subject property. The property will remain under that protection until it is accepted into trust. Wayland City Manager Mike Jager explained that once the property is in trust, the Wayland Township Fire Department will enter into a contract with the Tribe and Wayland City, based on a valuation of the property to determine the Tribe's share of payment. Mr. Jager opined that the Tribe would be liable to pay approximately 2% of the yearly budget for fire protection services, which is currently set at $152,000.00 per year. The Tribe has received a "will-serve" letter from the City of Wayland, attached hereto as Exhibit 10.

Emergency medical services will be provided by Wayland Area Emergency Medical Services (**WAEMS**). A "will serve" letter has been provides to the Tribe by WAEMS, attached hereto as Exhibit 8. Tribal officials have met with Mr. Bob Hess, the General Manager of WAEMS. Mr. Hess informed the Tribe that WAEMS has current resources to provide care for the Tribe's gaming facility; there are,

however, some concerns about the impact of non-billed and bad debt services that could the strain the finances of WAEMS.

Mr. Hess asked the Tribe to adopt the emergency medical services portion of the Michigan Public Health Code in order to provide WAEMS with a framework within which to operate on tribal lands. The Tribe intends to enter into a contract with WAEMS incorporating the above set forth provisions, Specifically, the contract will include provisions with regard to covering the costs for crews that shall be paid on a "per call" basis, and, for covering the expenses of WAEMS in the event of a "non-paid transport". For example, if WAEMS transports a patron of the Tribe's gaming facility to a local hospital, the patron is billed. If WAEMS is unable to collect payment from the patron within nine months, the Tribe will reimburse WAEMS 60% of the payment due, in order to mitigate the impact of non-billed and bad-debt service. Mr. Hess explained that WAEMS currently is staffed with 70 volunteers; three paid full-time emergency medical technicians and five ambulances. The closest ambulance is located in Wayland City, approximately three minutes from the proposed gaming facility.

In sum, productive discussions with WAEMS and the Tribe have resulted in an intent to enter into a contract for services. The contract for services will cover bad-debt services, adoption of the EMS Michigan Public Health Code via tribal ordinance, cross-training with the gaming facilities' emergency medical staff and special event coverage. The final

agreement will be provided as a supplement to this fee-to-trust application.

With regard to land use, the subject property is currently zoned as industrial. The proposed land use is consistent with the Wayland Township land use plan. As set forth in Exhibit 9, Wayland Township has provided the Tribe with a letter of support for this fee-to-trust application. "The proposed uses of the parcels, including the casino development, are consistent with Wayland Township land use plans. We believe that the casino development will be compatible with surrounding land uses, and be an asset to our community. We applaud the Tribe's efforts to bring jobs, economic development, and revenue sharing to Allegan County. The Township would like to work as a partner with the Gun Lake Tribe to create economic opportunities within the Township, which will allow us to preserve our rural character and viability as a community." Also, the Wayland Township Board has enacted Resolution number 21-2001, supporting the Tribe's Fee-to-Trust Application, attached hereto as Exhibit 11.

6. 25 C.F.R. § 151.10(g) – Whether the Bureau of Indian Affairs is Equipped to Discharge the Additional Responsibilities Resulting from the Acquisition of the Land in Trust Status

The Tribe submits the Bureau of Indian Affairs will not incur any additional responsibilities as a result of the conversion or the property to trust status. The Tribe intends to be responsible for all expenses and maintenance with regard to the

property and to address all legal matters that may arise with regard to the property.

7. **25 C.F.R. § 151.10(h) – The Extent to Which the Applicant has Provided Information that Allows the Secretary to Comply with 516 DM6, Appendix 1B and 602 DM 2**

Environmental assessments have been performed on the subject property, and will be provided to the BIA by Analytical Environmental Services of Sacramento, CA.

8. **25 C.F.R. § 151.11 – Off-Reservation Acquisitions**

25 C.F.R. § 151.11 provides that "the Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is *located outside of and non-contiguous to the Tribe's reservation and the acquisition is not mandated. . ..*" The Tribe does not believe that this section is applicable to the initial acquisition of reservation land for a restored tribe that has no reservation. Nevertheless, even if this section is applicable, its requirements can be readily addressed, as provided below.

(a) Section 151.11(b) concerns the location of a proposed trust acquisition relative to the Tribe's existing reservation. The Tribe does not have an existing reservation. The subject parcel is located approximately 40 miles from the nearest state boundary.

(b) 25 C.F.R. Part 151.11(c) asks that when land is being acquired for business purposes, that the Tribe provide a plan which specifies the anticipated economic benefits associated with the proposed use. A Business Plan, specifying the anticipated economic benefits associated will the Tribe's proposed use of this acquisition will be provided as a supplement to this application.

9. 25 C.F.R. § 151.13 – Title Examination

(a) The Tribe shall furnish the required title evidence to the Secretary upon the Secretary's determination that the Secretary will approve the present fee-to-trust request. Title evidence shall meet the Standards for the Preparation of Title Evidence and Land Acquisitions by the United States, issued by the United States Department of Justice (2001).

10. 25 U.S.C. § 2719, Section 20 – Indian Gaming Regulatory Act

25 U.S.C. § 2719, Section 20 of the IGRA addresses the use of land acquired in trust when the intended use of the land is for gaming. Section 20 of the IGRA, however, prohibits gaming on lands acquired in trust after October 17, 1988, unless certain exceptions apply. 25 U.S.C. § 2719 provides, in relevant part:

> (a) Prohibition on lands acquired in trust by Secretary
>
> Except as provided in subsection (b) of this section, gaming regulated by

this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; . . .

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State. and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the

> Secretary under the Federal acknowledgment process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

The Restored Lands Exception

As the plain language of Section 2719(b)(1)(B)(iii) indicates, lands that are acquired as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition" are exempt from the prohibition against gaming on lands acquired into trust after October 17, 1988. In determining whether a tribe meets the restoration exception under section 2719(b)(I)(B)(iii) it must first be determined, "whether the [tribe] is a "restored" tribe within the meaning of the provision, and second, whether the land was taken into trust as part of a "restoration" of lands to such restored tribe." Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney, 46 F. Supp. 2d 689, 696 (W.D. Mich. 1999).

"[A] tribe is "restored" when its prior recognition has been taken away and later restored." Grand Traverse Band, 46 F. Supp. 2d at 699. In prior opinions addressing the issue of whether a tribe is "restored" under the definition of IGRA, the Solicitor, Indian Affairs has opined, "Returning a tribe to its former status as a recognized tribe ought to be considered a 'restoration' of the tribe, and such tribes ought to be considered 'restored' regardless of the exact terms used." Sept 19, 1997 Memorandum from Solicitor J. Leshy to Interior Secretary Babbitt

re: Pokagon Band of Potawatomi Indians; Nov. 12, 1997 Memorandum from Solicitor J. Leshy to Deputy Commissioner, Indian Affairs regarding Little Traverse Bay Bands of Odawa Indians. The Solicitor also opined that the "common thread" with all restored tribes is that these tribes previously were not on the list of federally recognized tribes published in the Federal Register, and now the tribes appear on that list. Pokagon Memorandum, supra.

Given that the Grand Traverse Band was restored via the same acknowledgement process as the Gun Lake Band, and was concededly considered a "Restored" Tribe for purposes of IGRA, the obvious and correct conclusion is that the Gun Lake Tribe is also Restored for purposes of IGRA.

"Restored Lands" Under IGRA Section 2719(b)(1)(B)(iii)

The second portion of the analysis under Section 2719(b)(1)(B)(iii) involves an inquiry into whether the lands acquired by the tribe are "restored" within the meaning of that Section. Section 2719(b)(1)(B)(iii) has been recently clarified by federal courts with regard to whether particular lands may be considered restored under Section 2719. In fact, two federal courts have recently weighed in on the issue, and each court has expressly rejected a narrow interpretation of the scope of the restored lands exception.

In Grand Traverse, the Court rejected the government's narrow interpretation of the term "restored" in favor of a plain meaning of the term, holding, ***"if a tribe is restored under the statute,***

any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719." The Court continued. "[T]he (B)(iii) exception requires only that the lands in issue to be part of "the restoration of lands for any Indian tribe that is restored to federal recognition. That language implies a *process rather than a specific transaction*, and most assuredly does not limit restoration to a single event." Id. at 701 (emphasis supplied). The Court in Grand Traverse continued:

> The government contends that in order to be "part of . . . the restoration of lands" to a restored tribe, some congressional action is required beyond the simple language of the exception. Otherwise, the government asserts, restored tribes will be placed in a comparatively advantaged position vis-à-vis tribes which were not restored, because all acquisitions of property subsequent to restoration, without limitation, will be excepted from the statute.
>
> However, accepting the government's position that some limitation is required, nothing in the record supports the requirement of Congressional action. Given the plain meaning of the language, the ***term "restoration" may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes***

> while simultaneously limiting after-acquired property in some fashion. For example, land that could be considered part of such restoration might appropriately be limited by the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration. Id. at 700 (emphasis supplied).

The Court in Grand Traverse also held that the fact that the government treated similarly situated tribes as having restored lands weighed in favor of a finding that the lands were restored under Section 2719. In so doing the Court relied on 25 U.S.C. § 476(f) which provides, in relevant part,

> Departments or agencies of the United States **shall not** promulgate any regulation or **make any decision or determination pursuant to** [25 U.S.C. § 461, et seq.], or **any other Act of Congress with respect to a federally recognized Indian Tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes** . . .

Id., at 701 (emphasis supplied).

The Court's rationale in the Grand Traverse case was recently bolstered in Confederated Tribes of the Coos, Lower Umpqua, and Suislaw Indians v.

Babbitt 116 F. Supp. 2d. 155 (D.D.C.) (2000). In Confederated Tribes, the Department of the Interior had applied an "unduly narrow interpretation" of the term "restored" in deciding that land of the Confederated Tribes were not restored under section 2719(b)(1)(B)(iii). The Court in Confederated Tribes held that the Department's asserted justification for its narrow interpretation of Section 2719 "is not enough to overcome the plain meaning of the word "restoration", particularly in light of the rule of liberal construction favoring Indians." Id. at *164. The Court summed up the "plain meaning" definition of restored lands as follows:

> [R]estored Tribes which reacquired lands previously held by the Tribe would qualify for the exception. The "restored lands" could be construed to mean just that, the Tribe would be placed back in its former position by reacquiring lands. ***The manner of the restoration would not matter.*** Id. at * 162 (emphasis supplied).

The Court expressly rejected the government's claim that, "restoration of lands must be tied to the 'statute that restores the Tribe's federal recognition status." Id. The Court held that this plain meaning of the term restoration may only be limited so as to avoid a situation where any and all property acquired by restored tribes would be eligible for gaming. The shorthand test is to further the Congressional intent by placing "belatedly restored tribes in a comparable position to earlier recognized tribes." The Court agreed with the Federal Court's

decision in Grand Traverse, which suggested accomplishing this shorthand test, when necessary, by limiting lands considered to be restored lands by the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the restoration. Id. at 164. Finally, the Court in Confederated Tribes held that, in deciding whether certain lands qualify as restored, the government must "consider *all matters* which might entitle the [tribe] to an exception pursuant to section 2719(b)(1)(B)(iii), and must, "adequately consider the principle of liberal construction in favor of Indians." Id. at 164.

In sum, the Gun Lake Tribe must be considered as a "restored" Tribe for purposes of the IGRA. The lands that are the subject of this application are indisputably within an area historically occupied by the Tribe - quite literally "Just up the street" from the historic Griswold Colony. Thus, the subject land must properly be considered to be land taken into trust as part of the restoration of lands to the Gun Lake Tribe. It is time to place this belatedly restored tribe in a comparable position to earlier recognized tribes, as this application has been submitted shortly after their acknowledgment become final. Finally, the Tribe submits that 25 U.S.C. 2719(b)(1)(ii) is another applicable exception, as the Tribe has requested that the Secretary of the Interior acknowledge the lands that are the subject of this application to be part of the initial reservation of the Tribe - a Tribe that has recently been acknowledged as a federally recognized Indian tribe under the Federal Acknowledgment Process.

EXHIBIT LIST

1. Resolution dated July 31, 2001.
2. Bureau of Acknowledgment and Recognition Report
3. Legal Description of Parcels
4. Plat Map
5. Warranty Deed
6. Tax Statement
7. Will-Serve Letter - Allegan County Sheriff's Department
8. Will-Serve Letter - Wayland area Emergency Medical Services
9. Letter of Support from Wayland Township
10. Will-Serve Letter from the City of Wayland regarding Fire Protection
11. Resolution of Support from the Wayland Township Board

United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

April 18, 2005

Memorandum

To: Regional Director, Midwest Region

From: James E. Cason, Associate Deputy Secretary [Signed]

Subject: Request by the Match-E-Be-Nash-She-Wish-Band (Gun Lake Tribe) of Pottawatomi Indians of Michigan Trust Acquisition of 147 acre parcel in Wayland Township, Allegan County, Michigan

The Match-E-Be-Nash-She-Wish-Band (Gun Lake Tribe) of Pottawatomi Indians of Michigan request to acquire approximately 147 acres of fee land in trust for gaming and supporting documentation has been reviewed by the appropriate Bureau of Indian Affairs' offices within Central Office. The transaction documents were submitted to Central Office as required by a Secretarial directive dated July 19, 1990.

By memorandum dated March 25, 2004, your office transmitted the Tribe's application and supporting documentation with a recommendation that the request receive approval.

The two parcels equaling 147.48 acres for the Gun Lake Tribe are described as follows:

Parcel 1 is located in the Township of Wayland, County of Allegan in the State of Michigan, and is described as follows:

That part of the Northwest ¼ of Section 19, Township 3 North, Range 11 West, Wayland Township, Allegan County Michigan, described as: Beginning at a point on the East-West ¼ line of said Section which is North 86 degrees, 57 minutes, 24 seconds East, 481.98 feet from the West line of said Section, said point being on the Easterly line of Highway US-131 on ramp; thence North 17 degrees, 29 minutes, 59 seconds West, 862.94 feet along said Easterly line; thence North 02 degrees, 23 minutes, 15 seconds West, 1806.10 feet along the Easterly line of Highway US-131, Easterly said line being 125 feet Easterly of, measured at right angles to, and parallel with the survey line of said Highway US-131; thence North 87 degrees, 07 minutes, 54 seconds East, 2.470.95 feet along the North line of said Section; thence South 03 degrees, 27 minutes, 58 seconds East, 1,448.14 feet along the Westerly right-of-way line of the Conrail Railroad (being 50.00 feet Westerly of, measured at right angles

to, and parallel with the North-South ¼ line of said Section) to a point which is North 03 degrees, 27 minutes, 58 seconds West, 1,186.00 feet from the East-West ¼ line of said Section; thence South 86 degrees, 57 minutes, 24 seconds West, 926.00 feet; thence South 03, degrees, 27 Minutes, 58 seconds East, 430.00 feet; thence South 86 degrees, 57

minutes, 24 seconds West, 194.00; thence South 03 degrees, 27 minutes, 58 seconds East, 431.00 feet; thence North 86 degrees, 57 minutes, 24 seconds East, 240.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East; 325.00 feet; thence South 86 degrees, 57 minutes, 24 seconds West, 1415.62 feet along the East-West ¼ lines of said Section to the point of beginning.

P.P. #03-24-019-026-30

Parcel 2 is located in the Township of Wayland, County of Allegan, in the State of Michigan and is described as follows:

That part of the Northwest ¼ of Section 19, Township 3 North, Range 11 West, Wayland Township, Allegan County, Michigan, described as: Commencing at the West ¼ corner of said Section; thence North 86 degrees, 57 minutes, 24 seconds East, 1,897.00 feet along the East-West ¼ line to a point which is South 86 degrees, 57 minutes, 24 seconds West, 930.00 feet from the center of Section, said point also being the point of beginning of this description; thence continuing North 86 degrees, 57 minutes, 24 seconds East, 682.00 feet along said ¼ line; thence North 03 degrees, 27 minutes, 58 seconds West, 330.00 feet parallel with the North-South ¼ line; thence North 86 degrees, 57 minutes, 24 seconds East, 198.00 feet; thence North 03 degrees, 27 minutes, 58 seconds West 856.00 feet along the Westerly right of way line of the Conrail Railroad (being 50.00 feet Westerly of, measured at right angles to, and parallel with, the North-South ¼ line of said Section); thence South 86 degrees, 57

minutes, 24 seconds West, 926.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East, 430.00 feet, thence South 86 degrees, 57 minutes, 24 seconds West, 194.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East, 431.00 feet; thence North 86 degrees, 57 minutes, 24 seconds East, 240.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East, 325.00 feet to the point of beginning.

Parcel Identification No(s). 03-24-019-026-20

Commonly Known As: 1123 129th Avenue, Bradley, Michigan

The review of the transaction documents was conducted in Central Office to insure compliance with applicable laws and regulations. *See* attached memorandum from Acting Deputy Assistant Secretary, Policy and Economic Development. It has been determined that all applicable laws and regulations have been complied with. We have determined that the Gun Lake Tribe's request would meet the requirements of IGRA exception 25 U.S.C. § 2719(b)(1)(B)(ii), from the general prohibition on gaming on after-acquired lands contained in U.S.C. § 2719(a).

You are authorized, pursuant to delegated authority in 209 DM 8, Secretarial Order No. 3150, as amended and 31AM 4.1G, as amended, to approve the property conveyance to ***The United States in Trust for the Match-E-Be-Nash-E-Wish Band (Gun Lake Tribe) of Pottawatomi Indians of Michigan*** under the authority of Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465 subject to the expiration of the thirty-day waiting

period required under 25 CFR Part 151.12. The Office of Indian Gaming Management will publish in the Federal Register notice pursuant to 25 CFR Part 151.12(b), a copy of which will be made available to you immediately following its publication.

Attachment

cc: Chairman, Gun Lake Tribe of Michigan

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
FEB 7 - 2012
CLERK

Nos. 11-246 and 11-247

In The Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

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QUESTIONS PRESENTED

I. Whether the Quiet Title Act and its reservation of the United States' sovereign immunity in suits involving "trust or restricted Indian lands" apply to all suits concerning land in which the United States "claims an interest," 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held.

II. Whether prudential standing to sue under federal law can be based on either (i) the plaintiff's ability to "police" an agency's compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

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In The
Supreme Court of the United States

Nos. 11-246 and 11-247

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 632 F.3d 702. The decision of the

district court (Pet. App. 25a-37a) is reported at 646 F. Supp. 2d 72.[1]

JURISDICTION

The court of appeals entered its judgment on January 21, 2011. Pet. App. 1a. The court denied petitions for rehearing and rehearing en banc from both the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and the United States on March 28, 2011. Pet. App. 38a-41a. Timely petitions for writs of certiorari were filed on August 25, 2011 by both the Match-E-Be-Nash-She-Wish Band and the United States, and both petitions were granted by this Court on December 12, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at No. 11-246, Pet. App. 43a-49a, and in an addendum to this brief.

STATEMENT OF THE CASE

A. Legal Framework

1. Congress enacted the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, to provide "the exclusive means by which adverse claimants could challenge the United States' title to real property" and to prescribe the precise terms on which the United States' sovereign immunity from suits disputing title to real property in which the United States holds an interest would be waived. *Block v. North Dakota ex rel. Bd. of Univ.*

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[1] Throughout this brief, "Pet. App." refers to the petition appendix filed in No. 11-246.

and Sch. Lands, 461 U.S. 273, 286 (1983). The QTA provides generally that the "United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Congress, however, expressly retained intact the United States' sovereign immunity with respect to "trust or restricted Indian lands," providing that "[t]his section does not apply to [such] lands[.]" *Id.*[2]

The QTA further provides that "[n]o preliminary injunction shall issue in any action brought under this section" against the United States, 28 U.S.C. § 2409a(c), nor shall the United States "be disturbed in possession or control of any real property involved in any action under this section," but instead the government must be permitted to pay compensatory damages in lieu of any permanent relief displacing its control over real property, *id.* § 2409a(b).

2. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, was enacted four years after the QTA, and it separately waives the United States' sovereign immunity from suit for actions "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity," *id.* § 702. The

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[2] Congress further provided that Section 2409a does not "apply to or affect actions which may be or could have been brought" under a variety of other comprehensive statutory schemes, such as the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680, and the Tucker Act, *id.* § 1491. *See id.* § 2409a(a).

APA, however, does not "affect[] other limitations on judicial review," nor does it "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.*

3. Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, to promote economic development for Indians and tribal self-government. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). To further that objective, the Reorganization Act authorizes the Secretary of the Interior, in his or her discretion, "to acquire * * * any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, * * * for the purpose of providing land for Indians." 25 U.S.C. § 465.

Before deciding whether to place land in trust and thus before the QTA's protections attach, the Secretary provides direct notice of the trust application to any affected state and local governments and an opportunity for them to object or to provide written comments regarding "the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.10 (governing acquisitions of land "within or contiguous to an Indian reservation"); *see id.* § 151.11 (governing acquisitions "outside of and noncontiguous to the tribe's reservation"). Once the Secretary completes his or her review and makes a determination to place land into trust, the Secretary issues a general public notice that affords "interested parties" a 30-day window to file suit challenging the trust decision before the land is placed into trust and thus before

the QTA's bar to review attaches. *See* 61 Fed. Reg. 18,082 (Apr. 24, 1996); 25 C.F.R. § 151.12(b).[3]

B. Factual Background

Petitioner, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, commonly known as the Gun Lake Tribe ("Gun Lake"), is a federally recognized Indian tribe situated near Kalamazoo, Michigan. *See Michigan Gambling Opposition ["MichGO"] v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008) (per curiam). In 2001, Gun Lake requested that the Secretary place a 147-acre parcel close to its ancestral homeland, known as the "Bradley Tract," into trust pursuant to the Reorganization Act. Pet. App. 27a. The application indicated that Gun Lake sought trust status for its land "to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs." J.A. 41. The application further identified Gun Lake's intention to construct and operate a gaming facility on the Bradley Tract. *Id.*; Pet. App. 2a. At the time, the Bradley Tract consisted predominantly of shuttered and unused factory and warehouse buildings, situated between a highway and a railroad line. *Michigan Gambling Opposition v. Norton*, 477

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[3] That process of postponing the trust acquisition pending judicial review followed an Eighth Circuit decision holding that the Reorganization Act would be unconstitutional if it did not afford a fair opportunity for judicial review. *See South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 880 (8th Cir. 1995), *cert. granted and judgment vacated sub nom. Department of the Interior v. South Dakota*, 519 U.S. 919 (1996).

F. Supp. 2d 1, 10 n.13 (D.D.C. 2007). The land is zoned for light industrial and commercial use. *Id.*

The Secretary provided specific notice of Gun Lake's trust application to the state and local governments whose taxing and regulatory authority over the Bradley Tract would be affected were the federal government to place the land into trust. *See* 25 C.F.R. § 151.10. The Secretary then undertook a lengthy administrative review of Gun Lake's application that included not only a determination of the land's eligibility for trust status under the Reorganization Act, but also the conduct of a required environmental assessment under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h, and a gaming-eligibility determination under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 ("IGRA"). *See MichGO*, 525 F.3d at 27. Following the completion of those reviews, the Secretary announced her intention to place the Bradley Tract into trust. Pet. App. 26a-27a.

Pursuant to applicable regulations, the Secretary advised that her "acceptance of the land into trust" would not occur for 30 days so that "interested parties" could, during that time period, seek judicial review and challenge the Secretary's action "before transfer of title to the property occurs." 70 Fed. Reg. 25,596 (May 12, 2005); Pet. App. 3a, 7a-8a.

Within that 30-day waiting period, an organization called Michigan Gambling Opposition ("MichGO") sued on the grounds that the trust acquisition violated the National Environmental Policy Act and IGRA, and that Section 5 of the Reorganization Act is an unconstitutional delegation of congressional power. *See MichGO*, 525 F.3d at 26.

The organization's claims were rejected on the merits by both the district court and the court of appeals. *See id.* at 28-33; *Michigan Gambling Opposition*, 477 F. Supp. 2d at 6-22. After this Court denied the organization's petition for a writ of certiorari, 129 S. Ct. 1002 (2009), the Secretary placed the Bradley Tract into trust for Gun Lake and thereby transferred title to the property to the United States. Pet. App. 31a n.10. In April 2009, the Secretary approved, by operation of law, a gaming compact negotiated by the State of Michigan and Gun Lake. 74 Fed. Reg. 18,397, 18,397-18,398 (Apr. 22, 2009).

On February 10, 2011, Gun Lake opened a gaming facility on a portion of the trust land that borders U.S. Highway 131.[4] Other portions of the trust land are used for tribal governmental offices, water treatment facilities, a waste water plant, and a public safety office. *See* C.A. App. 535-544. The business has since created more than 900 jobs and generated more than $10.3 million in revenue-sharing funds for local schools and State and local governments.[5]

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[4] *See* Chris Knape, *Gun Lake Casino opens, brings gambling on U.S. 131 between Kalamazoo, Grand Rapids*, THE GRAND RAPIDS PRESS, Feb. 10, 2011, http://www.mlive.com/business/west-michigan/index.ssf/2011/02/gun_lake_casino_opens_brings_g.html.

[5] *See* Press Release, *Gun Lake Tribe's Second State and Local Revenue Sharing Payments Exceed $7.8 Million*, http://www.mbpi.org/PDF/News/Press%20Releases/PR_Revenue_Sharing_Announcment.pdf; Al Jones, *Gun Lake Casino CEO John Shagonaby to offer insights Friday as WMU's Keystone Breakfast speaker*, KALAMAZOO GAZETTE, Jan. 23, 2012, http://www.mlive.com/business/west-

C. Procedural History

1. After the 30-day period for challenging the trust decision had passed and after the court of appeals had rejected MichGO's challenges, respondent David Patchak, who "is either a member of MichGO or closely affiliated with MichGO," filed his own suit under the APA alleging that the Secretary lacked the legal authority under the Reorganization Act to place the land into trust.[6] Respondent asserted standing on the ground that "he will be exposed to and injured by the negative effects of building and operating" a gaming facility, including changes in the alleged "rural character" of the area, "loss of aesthetic and environmental qualities," "increased property taxes," "weakening of the family atmosphere of the community," and "other aesthetic, socioeconomic, and environmental problems." J.A. 30. Respondent sought, *inter alia*, a declaration that the Secretary's decision to take title to the land in trust was "unlawful[]" and an injunction "revers[ing] the decision to take the Property into trust," which would require the United States to relinquish title. *Id.* at 38-39; *see* 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to this Act * * * shall be taken in the name of the United States in trust[.]"); U.S. C.A. Br. 41 ("To obtain any meaningful relief in this case, Patchak

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michigan/index.ssf/2012/01/gun_lake_casino_ceo_john_shago.html.

[6] Declaration of David K. Sprague in Support of Intervenor-Defendant's Opp. to Pltf. Mot. to Stay, No. 08cv1331, at 5 (D.D.C. Oct. 27, 2008) (Dkt. 31).

needs the courts to set aside Interior's land-into-trust decision, thus requiring the United States to relinquish its title to the Bradley property."); Resp. C.A. Br. 26 (asking court "to order the Bradley Tract taken out of trust").

Gun Lake intervened as a defendant in district court. Pet. App. 4a. Gun Lake and the Secretary moved to dismiss respondent's suit as barred by the QTA's express retention of sovereign immunity from suits challenging the United States' title to "trust or restricted Indian lands," 28 U.S.C. § 2409a(a). *See* J.A. 3. Gun Lake and the Secretary also moved to dismiss for lack of prudential standing on the ground that the interests that respondent asserted were not within the zone of interests protected by the only statute under which he sued, the Reorganization Act. Pet. App. at 30a.

2. The district court dismissed respondent's complaint on prudential standing grounds. Pet. App. 25a-36a. "Plaintiff, without a doubt," the court explained, "is not an intended beneficiary of the IRA," which Congress enacted "to enable tribal self-determination, self-government, and self-sufficiency in the aftermath of 'a century of oppression and paternalism.'" *Id.* at 33a (quoting *Mescalero Apache Tribe*, 411 U.S. at 152). "Rather, plaintiff seeks to vindicate only his own environmental and private economic interests," which "could not be further divorced" from the Reorganization Act's purposes. Pet. App. 33a-34a.

With respect to respondent's professed "interest in ensuring that only qualified tribes receive benefits under the IRA," the court explained that "such an interest, if true, is indistinguishable from the general

interest every citizen or taxpayer has in the government complying with the law." Pet. App. 34a. "To find that plaintiff has prudential standing on this basis alone." the court concluded, "would make a mockery of the prudential standing doctrine altogether." *Id.*

The court further held that respondent's allegations of injuries arising from gaming or alleged environmental and aesthetic harms "cannot save plaintiff's case" because there is "no evidence indicat[ing] that the [Reorganization Act] focuses on or otherwise seeks to protect the interests of the surrounding community or the environment." Pet. App. at 35a n.11. Those interests, the court explained, might be addressed by the National Environmental Policy Act or IGRA, but respondent sought no relief under those statutes as such claims had already been rejected in the *MichGO* litigation. *Id.*

Finally, the district court noted that its "continuing subject matter jurisdiction * * * [was] also seriously in doubt" under the QTA's express retention of sovereign immunity for suits challenging the United States title to "trust or restricted Indian lands," 28 U.S.C. § 2409a(a). Pet. App. 36a n.12.

3. The court of appeals reversed. Pet. App. 1a-24a. The court first held that respondent had prudential standing. The court acknowledged that respondent was not an intended beneficiary of the Reorganization Act, *id.* at 10a-11a, but held that prudential standing devolves "not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects," *id.* at 6a. Although

respondent's suit challenged only the Secretary's trust decision under the Reorganization Act, the court of appeals ruled that the prudential standing inquiry "must be evaluated in light of the intended use of the property," and because Gun Lake referenced IGRA in its fee-to-trust application, "[t]aken together," that Act and the Reorganization Act "arguably protected [respondent]" from his asserted environmental and aesthetic injuries. *Id.* at 9a. The court then ruled that, because respondent's injuries are "cognizable" and allegedly protected by IGRA, he had prudential standing to sue under the Reorganization Act. *Id.* at 11a.

With respect to the QTA, the court of appeals held that the "trust or restricted Indian lands" provision of the statute does not bar respondent's suit because, in the court's view, that provision's retention of the United States' sovereign immunity applies only when "the plaintiff is claiming an interest in real property contrary to the government's claim of interest." Pet. App. 18a.

SUMMARY OF ARGUMENT

As a matter of both sovereign immunity and prudential standing principles, respondent's suit is barred at the threshold because he invokes the wrong statute to relitigate already rejected claims in an effort to obtain remedies that Congress has expressly proscribed and that the statute he invokes could not effectively provide in any event.

I. Absent an express and unequivocal waiver of sovereign immunity, the United States cannot be sued. There is no such waiver of immunity for lawsuits challenging the United States' title to or

legal interest in lands held in trust for Indian tribes or individuals. Quite the opposite, the text of the Quiet Title Act explicitly and unconditionally retains the United States' full sovereign immunity from suits involving "trust or restricted Indian lands." 28 U.S.C. § 2409a(a). Congress was also unequivocal that, to the extent that the United States can be sued over "a disputed title to real property in which the United States claims an interest," *id.*, no preliminary or permanent injunctive relief can issue that would supplant the United States' "possession or control of any real property," *id.* § 2409a(b) & (c).

The court of appeals nevertheless held that respondent can obtain the very type of relief that is statutorily forbidden against the very type of property for which sovereign immunity was statutorily preserved in full. That was wrong.

First, there is no explicit and unambiguous way to get to that outcome in the statutory text. Congress did not carve trust lands out of its waiver as a mere condition on lawsuits claiming title to those same lands. By its plain text, the trust lands provision is an express and unqualified retention of full sovereign immunity over such lands. And it reflects a conscious congressional judgment that the countervailing cost to important national interests that such litigation would inflict makes a waiver of immunity unwarranted. Whether the plaintiff claims title himself or simply objects to the United States' title, the legal effect is the same, because title will inevitably be quieted in someone else, and the harm to national interests is the same.

Second, the court of appeals reasoned that the QTA authorizes suit only by plaintiffs asserting their

own title to property. Even assuming that narrow reading were correct (which is unclear), the court of appeals drew exactly the wrong conclusion. This Court has recognized on repeated occasions that the QTA is the type of precisely drawn, detailed statute that preempts resort to general remedial schemes and makes the QTA the "exclusive means by which adverse claimants could challenge the United States' title to real property." *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 285-286 (1983). When Congress carves certain claims and remedial mechanisms out of such detailed statutory schemes, the proper meaning of that exclusion is that those suits are barred. It is not that those plaintiffs asserting claims and seeking remedies that Congress expressly proscribed can go invoke generalized remedial schemes like the Administrative Procedure Act to end-run Congress's judgment.

Third, there is no sound reason why Congress would have wanted to afford plaintiffs with the most remote injuries and indirect interests in the land *greater* remedies and far less restricted procedural options than those who assert their own title to the land and thus who are the most directly injured by the federal government's infringing interest in the land.

Finally, the APA's general waiver of immunity does not help respondent. Congress expressly provided that the APA's waiver does not extend to claims for which another statute "expressly or impliedly forbids the relief which is sought" or imposes "limitations on judicial review." 5 U.S.C. § 702. This Court has already held in *Block* that the

QTA is exactly one of those other statutes to which Section 702 refers and thus the APA cannot be read in a way by which "the Indian lands exception to the QTA would be rendered nugatory." 461 U.S. at 285.

II. Respondent's complaint stumbles at the starting gate for yet another reason: he lacks prudential standing. A foundational requirement of prudential standing is a showing that the plaintiff falls within the zone of interests of the statutory provision under which he has filed suit, which in this case is the Indian Reorganization Act. Respondent's asserted anti-gaming, aesthetic, and environmental injuries, however, lack any anchor in the Reorganization Act's text, provisions, or recognized purposes. He neither is an Indian or tribal beneficiary of the Act, nor is he positioned similarly to the states and local governments on whose regulatory jurisdiction the Secretary's trust decisions directly operate.

Indeed, respondent does not really claim any injury arising from the trust decision at all. Only a small portion of the entire trust land is used for gaming purposes, and respondent asserts no legal injury from or objection to how roughly 75% of the trust land is used. He instead objects to how Gun Lake, not a federal agency, is using a single portion of the lands now that they are in trust. Those objections to the gaming use and alleged environmental effects, however, are addressed by other statutes (*i.e.*, the Indian Gaming Regulatory Act and the National Environmental Policy Act) under which respondent chose not to sue, presumably because the court of appeals had already rejected such claims in earlier litigation. Those claimed

injuries from one use of the land do not arise from the Secretary's decision to place the land into trust in the first place.

The court of appeals reasoned that IGRA and the Reorganization Act were sufficiently linked to permit piggybacking the former statute's zone of interests on top of the Reorganization Act. That is not how prudential standing works.

First, this Court has repeatedly held that prudential standing must be grounded in the precise statutory *provision* that the plaintiff invokes. While on rare occasion the Court has found two provisions within the same statute to be integrally related, the Court has never allowed a plaintiff to appropriate interests protected by one statute to sue under another. In fact, in *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991), this Court forbade the exact same lend/lease approach to prudential standing that the court of appeals approved here.

The same must be true here where the Reorganization Act's terms, content, purposes, and even helming agencies differ materially from IGRA. Moreover, the Reorganization Act lacks any discernible statutory standards that could be employed to evaluate or adjudicate respondent's claims. The Secretary's trust decision under the Reorganization Act simply does not turn upon the gaming or non-gaming uses of trust land. Nor would stripping the United States of trust title itself do anything to remediate respondent's asserted injuries; it would simply transfer regulatory authority over the land's use from the federal to the state government.

Second, while respondent might have been able to ground prudential standing for his claimed injuries in IGRA, the injuries he asserts had already been pressed and rejected in the earlier *MichGO* litigation. The proper conclusion to draw from that statutory reality is that, if the on-point federal statutes preclude relief, prudential standing principles do not permit a plaintiff to import those same interests into a different statutory scheme just to litigate them all over again.

Finally, respondent's "intense and obvious" interest in "polic[ing]" agency compliance with the law (Pet. App. 6a, 11a) does not establish prudential standing. This Court has held time and again that Article III standing turns on possession of the requisite legal interest, not motivation. To hold that prudential standing requires nothing more than a cognizable injury and a desire to superintend agency action, as the court of appeals did here, would simply collapse the prudential and Article III standing inquiries.

ARGUMENT

Respondent's complaint should have been dismissed for lack of jurisdiction because he is using the wrong statutory remedial scheme to enforce the wrong statute, all in an effort to wrongfully obtain relief that Congress expressly has forbidden in both the QTA and the APA.

I. THE QUIET TITLE ACT RETAINS THE UNITED STATES' SOVEREIGN IMMUNITY FROM ADMINISTRATIVE PROCEDURE ACT SUITS SEEKING TO FORCE THE UNITED STATES TO RELINQUISH TITLE TO INDIAN TRUST LANDS

Respondent's suit seeking to strip the United States of the trust title it holds to the Bradley Tract is barred because Congress expressly preserved the United States' sovereign immunity from such suits in both the QTA and the APA.

A. Congress's Waiver Of Immunity From Suits Seeking To Divest The United States Of Title To Real Property Must Be Express And Unambiguous

The starting point in determining whether respondent may challenge the United States' title to trust land is the foundational principle that, as a sovereign, the United States "'is immune from suit save as it consents to be sued.'" *Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). As a matter of separation of powers, only Congress can waive the United States' sovereign immunity. *See Block*, 461 U.S. at 287 (applying QTA). Accordingly, to ensure that a waiver occurs only upon congressional direction and not judicial inference, this Court requires that any waiver of sovereign immunity "'must be unequivocally expressed'"; it "'cannot be implied.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citation omitted). And any ambiguities or doubts must be "'construe[ed] * * * in favor of immunity.'" *Lane v. Pena*, 518 U.S. 187, 192

(1996) (quoting *United States v. Williams*, 514 U.S. 527, 531 (1995)).

A "necessary corollary" of that rule "is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block*, 461 U.S. at 287.

B. The Quiet Title Act Statutorily Codified The United States' Full Immunity From Suits Challenging Title To Indian Trust Lands

There is no express statutory waiver of immunity for suits challenging the United States' title to Indian trust lands. Quite the opposite, Congress reconfirmed and expressly retained intact in the text of the QTA the United States' full immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands.

1. The Retention of Full Immunity for Indian Trust Lands is Explicit in the Quiet Title Act's Text

The QTA is a "precisely drawn, detailed statute" with "carefully-crafted provisions" designed for the "protection of national public interests" embodied in the federal government's ownership, control, possession, and use of real property. *Block*, 461 U.S. at 284-285, 290. Chief among those "national public interests" (*id.* at 290) were ensuring the stability and reliability of the United States' title to land and avoiding "seriously disrupt[ing] ongoing federal programs" and obligations with respect to land in the government's control or possession, *United States v.*

Mottaz, 476 U.S. 834, 847 (1986). To protect against such harms, Congress expressly conditioned its waiver of immunity for title disputes to real property in which the United States has an interest on a prohibition of preliminary injunctive relief against the government, 28 U.S.C. § 2409a(c), and any other permanent injunctive or equitable remedies that would "disturb[] [the United States] in possession or control of any real property involved in any action under this section," *id.* § 2409a(b).

Upon those remedial terms and conditions (among others), Congress generally waived the United States' sovereign immunity from suits "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a).

At the same time, Congress specifically stated that its waiver of immunity in "section [2409a] does not apply to trust or restricted Indian lands" at all, 28 U.S.C. § 2409a(a). That was necessary "to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made" in treaties, formal agreements, and elsewhere. *Mottaz*, 476 U.S. at 843 n.6; *see* H.R. Rep. No. 1559, 92d Cong., 2d Sess. 13 (1972) ("President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians."); S. Rep. No. 575, 92d Cong., 2d Sess. 4 (1971) (same).[7] Because of those distinct third-party

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[7] Gun Lake is a party to the following treaties: The Greenville Treaty of August 3, 1795 (7 Stat. 49); Treaty of Fort

interests and treaty-based concerns. Congress statutorily enshrined in the QTA its full immunity from suits challenging the United States' title to Indian trust lands. *Mottaz*, 476 U.S. at 843. Accordingly, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *Id.*

Taken together, the "'balance, completeness, and structural integrity'" of the QTA's provisions create the type of "precisely drawn, detailed statute" that "preempts more general remedies" in litigation challenging the United States' title to or legal interest in real property. *Block*, 461 U.S. at 285 (quoting *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976)). "Congress intended the QTA," and only the QTA, "to provide the exclusive means by which adverse claimants could challenge the United States' title to real property," *Block*, 461 U.S. at 286, and as part of that determination, specifically walled

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Industry of July 4, 1805 (7 Stat. 87); Treaty of Detroit of November 17, 1807 (7 Stat. 105); Treaty of Chicago of August 29, 1821 (7 Stat. 288); Treaty of July 29, 1829 (Prairie Du Chien) (7 Stat. 320); Treaty of September 29, 1817 (7 Stat. 160); Treaty of October 2, 1818 (7 Stat. 185); Treaty of October 16, 1826 (7 Stat. 295); Treaty of September 19, 1827 (7 Stat. 305); Treaty of September 20, 1828 (7 Stat. 317); Treaty of October 20, 1832 (7 Stat. 378); Treaty of October 26, 1832 (7 Stat. 394); Treaty of October 27, 1832 (7 Stat. 399); Treaty of September 26, 1833 and Articles supplementary of September 27, 1833 (7 Stat. 431, 442); Treaty of September 20, 1836 (7 Stat. 513); Treaty of July 31, 1855 (11 Stat. 621).

off Indian trust lands from title-challenging litigation.

2. *The Quiet Title Act's Express Retention of Immunity Applies Regardless of Whether the Plaintiff Asserts Title*

Notwithstanding this Court's direction in *Block* and *Mottaz* confirming the preemptive exclusivity of the QTA and its trust lands bar to suit, the court of appeals held that the QTA's retention of immunity applies only when plaintiffs assert their own title to land. Pet. App. 23a-24a. When the plaintiff lacks any legal claim of his own to the land at issue, the court reasoned, the QTA and its protections for "national public interest[s]" (*Block*, 461 U.S. at 284-285) fall away, and the United States' own title to real property is subject to adjudication under any general remedial scheme a plaintiff can find. Pet. App. 23a-24a.

To be clear, the court of appeals' view means that respondent's lack of any actual, direct legal interest in the land at issue empowers him to seek the very type of displacing injunctive relief against the United States expressly withheld by the QTA and to enforce the very dispossession of title and supervisory control forbidden by the QTA against the very Indian trust lands that Congress statutorily cloaked with full sovereign immunity in the QTA. That conclusion would stand the text and purpose of the QTA, as well as basic principles of interpreting and enforcing waivers of sovereign immunity, on their heads.

First, if the premise that the QTA applies only to plaintiffs asserting their own claim to title is correct, then the only proper conclusion to draw is the

opposite of that reached by the court of appeals: the QTA must comprehensively prohibit all other suits challenging the United States' title by those, like respondent, who lack their own property interest in the land. Dictating the forum and terms on which the *United States*' title to real property is determined, and thereby ensuring that the litigation proceeds on terms compatible with the national interest and the government's operational needs, is the whole point of the QTA. The Act thus prescribes precisely the terms—such as the statute of limitations, remedial constraints, pleading requirements, and jury trial bar, 28 U.S.C. § 2409a(b)-(g)—on which the United States can be haled into court to defend its legal interest in real property. 28 U.S.C. § 2409a(a) (QTA governs when "[t]he United States may be named as a party defendant in a civil action" disputing its legal interest in land).

Those terms, and no others, are the grounds on which Congress was willing to subject the United States' legal interests in real property to suit. It thus is implausible that Congress would have intended for the remoteness of the plaintiff's legal interest, rather than the presence of the United States as a defendant protecting its title, to dictate the remedial scheme and terms on which litigation can proceed.

The court of appeals, however, did just that. It turned a perceived limitation on which plaintiffs Congress allowed to sue under the QTA into a license for those debarred plaintiffs to go obtain under any general remedial scheme—or perhaps even under the immunity-evading procedural concoctions of the pre-QTA era, *see Block*, 461 U.S. at 281—the very remedies forbidden by the QTA. And they get to sue

the United States freed from all of the litigation constraints imposed by the QTA on real property suits against the federal government. That makes no sense at all.[8]

Instead, if the court of appeals were correct that the QTA applies only to plaintiffs who themselves assert title, then settled precedent of this Court demanded that the court preclude circumvention of that deliberate congressional judgment through resort to a generalized remedial scheme like the APA. When Congress enacts a specific and carefully tailored remedial scheme—particularly one creating a remedy against the United States that did not previously exist—that scheme, with all of its limitations, "is generally regarded as exclusive." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (citing *Block*, 461 U.S. at 285). In other words, the QTA, as a "precisely drawn, detailed statute," "preempts" respondent's "more general remedies."

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[8] Prior to the QTA, "[e]nterprising claimants" had attempted to skirt the sovereign immunity barrier to suit by "press[ing] the so-called 'officer's suit'" against individual federal officers under state tort law. *Block*, 461 U.S. at 281 (discussing *Malone v. Bowdoin*, 369 U.S. 643 (1962), and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)). But as "a device for circumventing federal sovereign immunity in land title disputes, the officer's suit ultimately did not prove to be successful." *Id.* There is no sound basis for concluding that Congress intended to revive for those plaintiffs least directly affected by the government's interest in real property the very patchwork of generalized procedural challenges displaced by the QTA. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997) (refusing to extend *Ex parte Young*, 209 U.S. 123 (1908), to suits challenging a sovereign government's title to land).

Block, 461 U.S. at 285 (citing *Brown*, 425 U.S. at 834). It certainly does not point him to them, as the court of appeals held.

Second, and in any event, the court of appeals' holding overlooks that, as part of its immunity-waiving bargain in the QTA, Congress was explicit that the United States' full immunity with respect to trust lands must be preserved intact. Instead, the court's holding assumed (Pet. App. 14a-23a) that any limitations on the scope of those actions that might fall *within* the QTA's waiver of immunity—such as restricting actions to plaintiffs asserting their own title—would also qualify Congress's retention of immunity for Indian trust lands.

But that is not what the QTA says at all. Because the QTA was enacted as a single statutory section, *see* Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (Oct. 25, 1972), Congress's direction that "[t]his section" does not apply to Indian trust lands carved such lands categorically out of the QTA's terms and expressly asserted and reconfirmed statutorily the United States' full sovereign immunity "from suit by third parties challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842, 843. The provision contains no qualifications or limitations on the retention of immunity, either based on the nature of the plaintiff's claim or otherwise.

Thus, nothing in the text of the QTA supports limiting that expressly retained immunity to a subset of challenges to trust title, or qualifying its operation based on how diluted the plaintiff's connection to the land is. That is because the retention of immunity is all about protecting the United States' legal interest

in trust lands, which does not vary based on the remoteness of the plaintiff's legal interest. And the QTA must "be strictly construed, in terms of its scope, in favor of th[at] sovereign" interest's protection. *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

Furthermore, because waivers of sovereign immunity are constitutionally committed to the Legislative Branch, the judicial presumption that Congress said what it meant and meant what it said in its unqualified retention of immunity should apply with constitutionally redoubled force here. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (waiver of immunity may not be "enlarge[d] * * * beyond what the language requires") (internal quotations and citations omitted).

Third, there is no logical reason that Congress would have wanted to turn its comprehensive sovereign-immunity protection for trust lands on and off based on how remote the individual plaintiff's connection to the land is. Respondent has never identified any reason why Congress would have chosen to permit suits by plaintiffs with *no* legal claim to or interest in the trust lands to go forward and to obtain the drastic injunctive relief of forcing the United States to surrender its legal title to and superintending control over the land, while those asserting actual title to the lands would be flatly debarred from suing at all.

Congress, after all, adopted the Indian trust lands exception to protect against any "abridg[ment] [of] the historic relationship between the Federal Government and the Indians without the consent of the Indians" and to prevent the violation of "written treaties" and "informal and formal agreements." H.R. Rep. No. 1559, *supra*, at 13 (quoting Sept. 29, 1971 letter of M. Melich, Solicitor, Department of the Interior); *see* S. Rep. No. 575, *supra*, at 4 (same). In Congress's judgment, "[g]reat nations, like great [people], should keep their word." *CIA v. Sims*, 471 U.S. 159, 175 n.20 (1985) (quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)).

That purpose has everything to do with preserving the stability and certainty of the *United States*' trust title, and nothing at all to do with *why* the plaintiff seeks to strip the United States of title, whether to enforce its own title claim or just to "police" alleged governmental wrongdoing (Pet. App. 6a). Either way, litigation aimed at forcing the United States to relinquish title or issuing an injunction that interferes with the United States' title to or superintending control of land "pose[s] precisely the threat to ongoing federal" or federally protected "activities on the property that the Quiet Title Act was intended to avoid." *Mottaz*, 476 U.S. at 847; *cf. Minnesota v. United States*, 305 U.S. 382, 386-389 & n.1 (1939) (discussing the significance of

the United States' legal interest in lands held in trust).[9]

Fourth, this Court has never given Congress's express retention of immunity for Indian trust lands in the QTA the cramped reading adopted by the court of appeals. In *Mottaz*, *supra*, individuals claiming title to Indian allotments sold by the Secretary to the United States Forest Service filed suit seeking to void the sale, 476 U.S. at 836-838. The nature of the plaintiffs' interest, however, played no part in this Court's analysis. What was critical was that the *United States'* title to the lands was being challenged. This Court was explicit and unequivocal that the trust lands provision "retain[s] the United States' immunity from suit by third parties challenging the *United States' title* to land held in trust for Indians," and that "when *the United States claims an interest* in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *Id.* at 842-843 (emphases added).

Fifth, even outside the trust lands context, this Court has emphasized that the QTA focuses on ensuring the stability of the United States' title to and legal interest in lands, not on the nature of the plaintiff's legal interest. In *Block*, North Dakota

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[9] Further evidence that the QTA's operation is keyed to the United States' interest, rather than the plaintiff's interest, is found in 28 U.S.C. § 2409a(e), which provides that jurisdiction under the QTA "cease[s]" if "the United States disclaims all interest in the real property or interest therein adverse to the plaintiff," and that disclaimer is confirmed by court order.

sought to quiet title to a riverbed on federal land over which the United States claimed ownership. 461 U.S. at 277-278. North Dakota sought to avoid the QTA's statute of limitations by bringing an "officer's suit" against "the federal officials charged with supervision of the disputed area," rather than a traditional quiet title action. *Id.* at 281. This Court held, however, that the QTA's provisions did not depend on the nature of the plaintiff's cause of action because "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge *the United States' title* to real property." *Id.* at 286 (emphasis added).

Presumably that is why Congress wrote Section 2409a(a) to cover all claims seeking "to adjudicate *a* disputed title to real property in which the United States claims an interest," without reference to whether the claim to title rests in the plaintiff, the United States, or both. 28 U.S.C. § 2409a(a) (emphasis added). And that makes sense because any challenges to title held by the United States, including claims like respondent's, necessarily seek to quiet title in someone other than the United States. The challenge to and quieting of title held by the United States is what triggers the QTA's sovereign-immunity protections.

The court of appeals' assumption, moreover, that Congress mapped onto the QTA some rigid conception of quiet-title plaintiffs overlooks "the wide differences in State statutory and decisional law" on quiet title actions at the time of enactment, which renders the court of appeals' dispositive reliance on common-law quiet-title actions "impractical." H.R. Rep. No. 1559, *supra*, at 9-10 (Oct. 6, 1971 letter of

Attorney General); *see* S. Rep. No. 575, *supra*, at 6 (same). For example, as even the court of appeals acknowledged, although the traditional common-law quiet title action could only be brought by "the holder of legal or equitable title to land," Pet. App. 15a, some (but not all) States had, by 1972, expanded the actions to allow those not in possession to sue, *id.* *See* John Montague Steadman, *"Forgive U.S. Its Trespasses?": Land Title Disputes With the Sovereign—Present Remedies and Prospective Reform*, 1972 Duke L. J. 15, 48-49 & n.152 (1972) (noting "[t]he sharp variety in requirements from state to state" for bringing a quiet title action).

The QTA, "properly understood and properly applied by the courts," thus was designed to "produce a more stable and predictable system of immunity from suit than the [prior] doctrine of sovereign immunity [could] ever attain—because it will be a system directly and honestly based upon *relevant governmental factors* rather than upon a medieval concept whose real vitality is long since gone." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 26 (1976) (May 10, 1976 letter of Assistant Attorney Gen. A. Scalia) (emphasis added); *see* S. Rep. No. 996, 94th Cong., 2d Sess. 25 (1976) (same). Here, barring suits by some plaintiffs who threaten to disrupt United States title to Indian lands but not barring the exact same suits when brought by less-interested plaintiffs, would fail to provide the required consistent treatment to the "relevant governmental factor" (*id.*) underlying Indian lands immunity.

In holding that the QTA only applies to cases where the plaintiff seeks to quiet its own title, the court of appeals stressed (Pet. App. 18a) that

subsection (b) of the QTA prohibits courts from ordering any relief that would "disturb[]" the United States' "possession or control of any real property," and instead requires that the government be permitted the option of making "payment to the person determined to be entitled thereto." 28 U.S.C. § 2409a(b). But that hurts rather than helps respondent because there is no reason why Congress would have wanted the existence of that important protection of the United States' legal interests to disappear simply because the plaintiff has *no* direct interest in the real property at issue. What should be dispositive is the challenge to United States' title.[10]

3. The Administrative Procedure Act's General Provisions Do Not Supplant the Quiet Title Act's Barrier to Relief

Having (wrongly) concluded that the QTA's express statutory retention of sovereign immunity for Indian trust lands was confined to lawsuits asserting the plaintiff's own title to those lands, the court of appeals grounded authority for respondent's action in the APA's general waiver of the United States' sovereign immunity. *See* Pet. App. 20a-24a. Section 702 of the APA provides that "[t]he United States

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[10] Subsection (d) of the QTA requires plaintiffs to identify the "nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). That, however, plainly presupposes that "rights" and "interests" asserted by plaintiffs other than title fall within the scope of the QTA. More importantly, that requirement simply to identify the claimed legal interest would presumably encompass situations where the plaintiff asserts legal injury arising from the fact that title should be quieted in a third party.

may be named as a defendant" in a suit for declaratory or injunctive relief arising from the action of a federal government agency. 5 U.S.C. § 702.

The court's discernment of a waiver of immunity in the APA for suits challenging the United States' trust title to real property was mistaken in three respects.

First, by its terms, Section 702 does not "affect[] other limitations on judicial review" and, in particular, it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. This Court, moreover, has already specifically held that "[t]he QTA is such an 'other statute,'" within the meaning of Section 702. *Block*, 461 U.S. at 286 n.22. In *Block*, the plaintiff specifically argued that the APA's waiver of immunity in Section 702 overrode the QTA's barrier to a non-quiet-title suit for relief. *Id.* This Court "rejecte[d] [that] claim" because, "if a suit is untimely under the QTA, the QTA expressly 'forbids the relief' which would be sought under § 702." *Id.*

Likewise here, the QTA's express reservation of immunity for Indian trust lands, as well as its flat prohibitions on preliminary injunctive relief and permanent injunctive remedial orders depriving the United States of "possession or control of" real property, 28 U.S.C. § 2409a(a), (b) & (c), expressly forbid the very same title-stripping injunctive and declaratory relief that respondent is attempting to obtain under the APA. *See Block*, 461 U.S. at 278 (noting State's claim for both injunctive and declaratory relief). Opening up the United States'

trust title to equitable APA actions, moreover, would also end-run the QTA's limitations period since injunctive relief aimed at an ongoing (and thus continually accruing) harm might be brought outside the 12-year period set by Congress for affording repose to federally held lands, *see* 28 U.S.C. § 2409a(g). *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997) (noting special sovereignty concerns caused by directing injunctive relief at government officials in cases concerning government lands, because such relief would "bar the State's principal officers from exercising their governmental powers and authority over the disputed lands").

Indeed, in *Block*, this Court was explicit that it would not "allow claimants to try the Federal Government's title to land" outside the QTA framework in part because, if it did, "the Indian lands exception to the QTA would be rendered nugatory." 461 U.S. at 285. Thus, both the plain text of Section 702 and *Block* proscribe respondent's effort to obtain under the APA precisely what Congress forbade all plaintiffs under the QTA.

Second, the court of appeals' assumption that confining the QTA waiver of immunity to plaintiffs asserting their own title somehow narrows the express statutory retention of immunity for Indian trust lands and takes it outside of the APA's "expressly or impliedly" proviso is wrong. The court's holding seems to assume that, for plaintiffs who are excluded from seeking relief under the QTA because they do not claim title or a sufficient legal interest, there existed nothing but the backdrop of silently implied immunity that the APA supplanted. Not so. Congress was anything but silent with respect to

preserving the United States' immunity from suits challenging title to Indian trust lands. Congress was quite explicit in the QTA that the United States cannot be made a party defendant to dispute its title to trust or restricted Indian lands. 28 U.S.C. § 2409a(a). The QTA thus is a full-throated, statutory codification of *unqualified* sovereign immunity from suits challenging the United States' title to or legal interest in such land, and a redoubled prohibition on obtaining injunctive relief or remedial orders aimed at dispossessing the United States of trust title. The APA does not upend all of that.

The plain terms of the QTA thus fall squarely within Section 702's limitation on the APA waiver of immunity because, in the course of granting consent to suit, the QTA expressly and (certainly) impliedly forbade court review and injunctive relief stripping the United States of trust title to and superintending control over Indian lands.

And even if the QTA omits plaintiffs who lack a legal claim to the real property at issue, that would mean the opposite of what the court of appeals concluded. Under *Brown* and *Hinck*, it means that claims like respondent's remain foreclosed because the QTA, as the narrower, "better fitted statute," "'pre-empts more general remedies.'" *EC Term of Years Trust v. United States*, 550 U.S. 429, 433, 434 (2007) (quoting *Brown*, 425 U.S. at 834). There certainly is no sound basis for concluding that those to whom Congress has denied relief altogether under the QTA can turn around and obtain an *even broader* remedy—one that is expressly foreclosed by the context-specific QTA statute—by invoking a general remedial scheme like the APA. "[R]esort to a general

remedy" to obtain the very relief expressly foreclosed in the narrower, specific remedial statute is forbidden. *Id.* at 434.

Third, Congress meant its "expressly or impliedly" limitation on the APA waiver of immunity to cover situations precisely like this. When choosing between two competing drafts of Section 702, Congress opted for the far broader "expressly or impliedly forbids the relief" language over an alternative that would have preserved immunity only when "any other statute * * * grant[ing] consent to suit [for money damages] forbids the relief which is sought," S. 800, 94th Cong., 2d Sess. 2 (1976) (as reported by S. Comm. on the Judiciary, Feb. 21, 1975).

That alternative ran the risk of unduly limiting the APA's retention of immunity "in such a fashion as to raise serious questions concerning the scope of the new reviewability which would be created." H.R. Rep. No. 1656, *supra*, at 27 (May 10, 1976 letter of Assistant Attorney Gen. A. Scalia); *see* S. Rep. No. 996, *supra*, at 26 (same). Specifically, because statutes predating the APA's immunity waiver "ha[d] been enacted against the backdrop of sovereign immunity," it "would [have been] extremely rare" for those statutes to have *expressly* barred relief on immunity grounds. H.R. Rep. No. 1656, *supra*, at 27-28; *see* S. Rep. No. 996, *supra*, at 26-27 (same). Preserving immunity when the relief sought was "impliedly" forbidden by another statute thus ensured that, "where statutory remedies already exist[ed], these remedies will be exclusive." H.R.

Rep. No. 1656, *supra*, at 27-28; *see* S. Rep. No. 996, *supra*, at 27 (same). [11]

As this Court recognized in *Block*, 461 U.S. at 286 n.22, the QTA is the archetypal statute falling within Section 702's "expressly or impliedly" bar to review. The QTA is a statute by which "Congress has consented to suit and the remedy provided is intended to be the *exclusive remedy* * * * with respect to a particular subject matter." H.R. Rep. No. 1656, *supra*, at 12-13 (emphasis added); *see* S. Rep. No. 996, *supra*, at 11-12 (same). Indeed, this Court has long acknowledged that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge" the United States' trust title to Indian lands. *Block*, 461 U.S. at 286; *accord Mottaz*, 476 U.S. at 841, 843 (applying trust lands exception).

The court of appeals' cramped reading of the trust lands provision (Pet. App. 23a-24a) reads "impliedly" right out of Section 702 and ignores that, under *Brown*, *Hinck*, and *EC Term of Years*, any specific

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[11] Because the text of Section 2409a(a) establishes the government's immunity from suit in this case, it is not "strictly necessary to confirm [this] reading of the statutory text by consulting the legislative history." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 n.9 (2010). Nevertheless, even in the sovereign immunity context, statutory construction preserving immunity can sometimes be reinforced by and "'benefit[] from [the] additional information'" provided by legislative history "'rather than ignoring it,'" *id.* (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611-612 (1991)), even though legislative history alone would never support a waiver of immunity ungrounded in clear and explicit statutory text, *see United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

limitations on actions under the QTA (such as requiring plaintiffs to assert their own title to the land) must be understood as implied prohibitions on relief for those excluded claimants, not licenses for them to obtain elsewhere what the "specific remedy" expressly proscribes. *Hinck*, 550 U.S. at 506. *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application.").

Fourth, there is no sound reason to conclude that, when Congress amended the APA to provide for a general waiver of the United States' immunity in suits challenging agency action, it meant to anomalously unravel the QTA's comprehensive prohibition on challenges to the United States' trust title solely for plaintiffs lacking any legal interests in those lands, while continuing to debar relief for those with the most direct claims and injuries. Whatever the individual plaintiff's impetus for bringing suit, the title-stripping relief sought would "pose precisely the threat to ongoing federal" or federally protected "activities on the property that the Quiet Title Act was intended to avoid." *Mottaz*, 476 U.S. at 847.

Beyond that, the limitation of QTA actions to plaintiffs seeking to quiet title would presumably reflect a congressional recognition that those plaintiffs as a class are most directly injured by the federal government's competing claim and suffer the greatest hardship if sovereign immunity bars their suits. *See* H.R. Rep. No. 1656, *supra*, at 8; S. Rep. No. 996, *supra*, at 7-8. Opening the United States up to suit by every third party who might wish to challenge the United States' legal interest even though lacking a competing interest in the property

of its own, by contrast, would subject the United States' title to a broad swath of litigation and perpetual instability. It is unlikely that Congress considered such second-hand interests to present sufficient hardship to warrant the countervailing burden litigation would impose on the stability and certainty of United States title, as well as on third parties who do have legal interests in the land (like Gun Lake) and who do not object to the United States' interest or title.

The court of appeals cast those anomalies and considerations aside, reasoning that the Congress that enacted the QTA in 1972 "did not have to concern itself" with suits by plaintiffs lacking title because, prior to the APA, "there was no general waiver of the government's sovereign immunity for non-monetary actions." Pet. App. 21a. But that rationale is precisely why Congress built the "expressly or impliedly" limitation into the APA: to ensure that the APA's general waiver did not unravel reservations of immunity that were "enacted against the backdrop of sovereign immunity." H.R. Rep. No. 1656, *supra*, at 27; *see* S. Rep. No. 996, *supra*, at 27-28 (same). Congress did everything it logically could have been expected to do in 1972 to ensure the wholesale preservation of sovereign immunity over title to trust lands and to wall the United States' title in such real property off from the rest of the QTA waiver. Thus, whether or not it would have been "far-fetched to attribute an intention to the *1972 Congress*" to have addressed injunctive actions like respondent's, Pet. App. 21a (emphasis added), it was the precise and conscious aim of the *1976 Congress* that enacted the "expressly or impliedly" proviso in

the APA to look back and preserve intact such comprehensive reservations of immunity as the QTA's trust lands provision.

Finally, this Court should not interpret the QTA "so narrowly as to defeat its obvious intent," *United States v. Braverman*, 373 U.S. 405, 408 (1963), of preventing disruption and uncertainty from pervading the trust status of Indian lands. Permitting suit here would defeat the very economic-development and community-building goals of the trust process.

At worst, whether Congress intended to allow less-interested plaintiffs to obtain under the APA what aggrieved title holders are flatly barred from obtaining under the QTA is a textually ambiguous question, and the court's authorization of respondent to obtain the very relief that the QTA textually prohibits "founders on the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Orff v. United States*, 545 U.S. 596, 601-602 (2005).

II. RESPONDENT LACKS PRUDENTIAL STANDING TO POLICE THE FEDERAL GOVERNMENT'S COMPLIANCE WITH THE LAW BECAUSE HIS ALLEGED INJURIES ARE DISCONNECTED FROM THE STATUTE HE SEEKS TO ENFORCE

The requirement that a plaintiff have standing to sue in federal court encompasses both constitutional and prudential limitations on the exercise of federal jurisdiction. The constitutional limitations flow from Article III's restriction of federal jurisdiction to actual "'case[s]' or 'controvers[ies].'" *Bennett v. Spear*, 520

U.S. 154, 162 (1997) (citation omitted). The prudential limitations reflect "'judicially self-imposed'" restrictions that counsel against the exercise of federal jurisdiction, even if Article III standing requirements are satisfied. *Id*; *see Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) (a plaintiff that has Article III standing "may still lack standing under the prudential principles by which" federal courts decline to exercise jurisdiction).

"Like their constitutional counterparts," prudential limitations on standing are rooted in concerns about the role of courts and respect for the separation of powers between and among the branches of the national government. *Bennett*, 520 U.S. at 162. Prudential standing doctrine enforces, as a "matter[] of judicial self-governance," the principle that federal courts should refrain from deciding questions that "other governmental institutions may be more competent to address." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Strict enforcement of prudential standing requirements thus respects the legislature's statutory boundaries by ensuring that the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.*

The court of appeals here cast aside the prudential standing doctrine's protective and limiting functions, holding that respondent can use the Reorganization Act to advance interests that are protected not by that Act, but by different statutes respondent did not sue under, just because the court

deemed him an appropriate plaintiff to "police" the government's compliance with law. That was error.

A. Respondent Falls Outside The Reorganization Act's Zone Of Interests

Since this Court's decision in *Association of Data Processing Services, Inc. v. Camp*, 397 U.S. 150 (1970), one core requirement of prudential standing has stood fast: the injury that the plaintiff seeks to remediate "must arguably fall within the zone of interests protected or regulated by the statutory provision invoked in the suit." *Bennett*, 520 U.S. at 162; *see National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) ("*NCUA*") ("[T]he plaintiff's interests" must be "among" the "interests 'arguably * * * to be protected' by the statutory provision at issue."); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886 (1990) ("[T]he relevant statute" for zone-of-interests purposes "is the statute whose violation is the gravamen of the complaint[.]"). By the same token, prudential standing does not exist where the plaintiff's asserted interests are "inconsistent with the purposes implicit in the statute." *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 870 (2011).

That requirement of concrete linkage between the plaintiff's interests and the statute's aims is indispensable to ensure that the broad cause of action licensed by the APA does not devolve into a general grant of citizen standing to enforce governmental compliance with the law for anyone with an Article III injury. Prudential standing's zone-of-interests test, in other words, prevents the "disruption" of daily operations of the federal government that could result if "every party adversely affected by agency

action [was allowed] to seek judicial review" on the ground that it exceeded the agency's authority. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 397 (1987).

"The essential inquiry" under the prudential standing doctrine thus "is whether Congress 'intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.'" *Clarke*, 479 U.S. at 399 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984)) (internal formatting omitted). In granting respondent prudential standing, however, the court of appeals erased that elemental component.

1. Respondent's Interests Are Divorced from the Reorganization Act's Terms and Operation

In determining whether a plaintiff is "arguably within the zone of interests protected by a statute," this Court "first discern[s]" the statute's interests and then "inquire[s] whether the plaintiff's interests affected by the agency action in question are among them." *NCUA*, 522 U.S. at 492 (internal citations omitted). Respondent fails that test. His purported interest in the aesthetic impact of gaming in an abandoned industrial area bordering a highway and already zoned for light industrial usage has no anchor in the Reorganization Act at all, let alone in the land-into-trust "statutory provision at issue[.]" *Id.*

To begin with, the "overriding purpose" of the Reorganization Act is to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton v. Mancari*, 417 U.S. 535,

542 (1974), and to encourage tribes to "revitalize their self-government" and take control of their "business and economic affairs," *Mescalero*, 411 U.S. at 151. Those Reorganization Act goals "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment," which had been the prevailing federal policy for over a century. *Id.*; *see County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) ("The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act," which "[r]eturn[ed] to the principles of tribal self-determination and self-governance.").

Moreover, the announced purpose of the particular provision under which respondent has sued—the land-into-trust provision—is to "authorize[]" the Secretary of the Interior "to acquire" land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. That trust authority "promotes the policy of protecting and increasing" Indian lands and "is the capstone" of the land-related provisions of the [Reorganization Act]." Felix S. Cohen, *Handbook of Federal Indian Law* § 15.07[1][a], at 1009-1010 (2005 ed.).

Respondent's interests have nothing to do with Section 465's purposes or the zone of interests it superintends. He is not an Indian or tribal official seeking land, and he does not even colorably claim an interest in advancing tribal development or self-governance. To the contrary, his avowed aim of taking land out of the very trust status that Congress deemed critical to promoting tribal economic development and self-governance demonstrates

adversity to, not consistency between, his interests and those served by Section 465. Interests that are "inconsistent" with statutory purposes and "are more likely to frustrate than to further statutory objectives" do not support prudential standing. *Clarke*, 479 U.S. at 397 n.12, 399.

Nor can respondent claim prudential standing on the ground that the trust decision has a regulatory impact on him. The Secretary's trust decision does not regulate him or the use of his own land, neither does the trust decision displace any preexisting authority he might have had over his own land or rights he enjoyed.

Respondent, after all, is not a state or local government whose own regulatory authority over the trust lands is cut off or circumscribed by the Secretary's trust decision. Such governmental entities are vested with prudential standing to challenge trust determinations. *See Connecticut v. United States Dep't of the Interior*, 228 F.3d 82, 85-86 (2d Cir. 2000) ("When the Secretary takes land into trust on behalf of a tribe pursuant to the IRA, several important consequences [for state and local governments] follow. Land held in trust is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or (3) state criminal and civil jurisdiction[.]") (internal citations omitted); *South Dakota v. United States Dep't of the Interior*, No. 11-1745, 2012 WL 75292, at *3 (8th Cir. Jan. 11, 2012) (Because the trust decision will cause the County to "lose [amounts] in annual property taxes," and deprive[] [it] of additional tax revenues,"

"the State has a direct and tangible economic interest in the agency's decision.").[12]

As entities directly regulated or restricted by Section 465's land-into-trust decisions, affected state and local governments have prudential standing because their interest in ensuring that the agency does not entrench upon their preexisting regulatory authority over lands within their jurisdiction coincides with and is reflected in the statutory provisions confining the agency to the regulatory limits charted by Congress. There thus is the "unmistakable link" between the state and local governments' interests and the objectives of the statute sued under that prudential standing requires. *NCUA*, 522 U.S. at 493 n.6.

By contrast, no consequences at all befall respondent as a result of the Secretary's trust

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[12] The regulations implementing Section 465 underscore the linkage between trust decisions and the interests of affected state and local governments. The regulations require the Secretary to afford only affected state and local governments early notice of a request from a tribe to place land into trust and to provide them an opportunity to comment on the request even before the Secretary makes the decision whether to place the land into trust. *See* 25 C.F.R. § 151.10 ("Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired. * * * The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impact on regulatory jurisdiction, real property taxes and special assessments."); *see also id.* § 151.11. In addition, affected state and local governments can seek judicial review of a final agency decision to place land into trust under 25 C.F.R. § 151.12(b).

determination itself. He is not a statutory beneficiary of the trust process, nor do his property or personal interests fall within the regulatory span of the trust decision. The prudential standing doctrine "denies a right of review" when, as here, the plaintiff's interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.[13]

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[13] Much different are cases in which this Court has held that competitors of entities regulated by statutes had prudential standing to challenge agency action authorizing the entities to pursue activities alleged to be in excess of what the statute allowed. *See Data Processing*, 397 U.S. at 155 (association of data processing businesses had prudential standing to challenge agency action authorizing national banks to engage in competing data processing activities); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) (association of investment companies had prudential standing to challenge agency action authorizing national banks to operate competing investment funds); *Clarke*, 479 U.S. at 403 (association of securities brokerage firms had prudential standing to challenge agency action authorizing national banks to provide competing brokerage services); *NCUA*, 522 U.S. at 493 (banks had prudential standing to challenge agency action allowing formation of credit unions that competed with banks for depositors). In each of those cases, Congress intended the relevant statutes to legislate against the very competition that plaintiffs sought to reign in; thus, the plaintiffs' competition-limiting interests coincided with the statutory objectives. By contrast, there is no indication that Congress intended for the Reorganization Act's land-into-trust provision to remediate private individuals' aesthetic objections to gaming.

2. *The Reorganization Act Does Not Address, Regulate, or Remediate Respondent's Claimed Injuries*

Respondent's goal of combating gaming is completely ungrounded in the Secretary's trust decision under Section 465 of the Reorganization Act. The Secretary's decision to put land into trust does not turn on any particular use of the land, gaming or otherwise. *See* 25 C.F.R. § 151.3. Instead, the trust decision turns on the Secretary's determination that the trust placement will promote the Reorganization Act's aims of "facilitat[ing] tribal self-determination, economic development, or Indian housing." *Id.*

While the Secretary noted in this case that the land would be eligible for gaming, 70 Fed. Reg. 25,596 (May 12, 2005), that was simply to kill two birds with one stone by making the separate IGRA gaming determination also sought by Gun Lake at the same time as the trust decision. *See* Admin. Rec. 0001514-0001518 (indicating that Secretary's decision to place land into trust is separate from determination that land is eligible for gaming). The Secretary's independent trust decision did not turn on that consideration, however, nor was it conditioned in any way on Gun Lake's subsequent use or non-use of the land for gaming. Indeed, only approximately 25% of the land placed into trust is used for the gaming facility, C.A. App. 540, and respondent asserts no legal injury or objection to how the balance of the land held in trust is being used.

The Secretary's decision to place the land in trust itself thus has no impact on respondent or his asserted interests. The fact that title to the land was conveyed to the United States, and that the United

States has superintendence over the land, does not constrain his use of his own property, impede the exercise of any of his personal rights, or occasion the aesthetic injuries of which he complains. Nor has he articulated any injury associated with 75% of the land held in trust or the other governmental, cultural, and economic uses of the trust land.

Rather, respondent's gaming and aesthetic objections are not to the Secretary's trust decision itself, but rather to *one particular usage* of a small portion of the land by Gun Lake *after* the land was placed into trust. But scouring the Reorganization Act, let alone Section 465, from top to bottom would uncover nothing that polices how land is used once placed into trust. The Reorganization Act provides absolutely no mandate to assess or standards for evaluating the propriety of gaming, gaming impacts, or the environmental concerns that respondent raises. If the prudential standing doctrine's zone-of-interests requirement means anything, it means that a plaintiff cannot use a statute to try and remediate asserted interests that the statute itself does not even mention, let alone establish relevant criteria for their protection or enforcement.

Instead, Congress has tasked different statutes, like IGRA and the National Environmental Policy Act, with addressing precisely the concerns that respondent raises. *See* 25 U.S.C. § 2719(b)(1)(A) (IGRA requires the Secretary, when considering whether to approve a tribal gaming operation, to take into account the effects of the proposed operation on the "surrounding community"); *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 464-465 (D.C. Cir. 2007) (community group had

prudential standing to sue under IGRA provision requiring Secretary of Interior to consider whether operation of a casino on land placed into trust would "'not be detrimental to the surrounding community'") (citation omitted); *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 855, 860 (D.C. Cir. 2006) (taxpayer group, including persons living adjacent to a proposed Indian gaming site, had prudential standing to sue under National Environmental Policy Act provision requiring Secretary of Interior to consider environmental impact of decision to place land into trust for tribe).

But respondent chose not to sue under those statutes. And for good reason. The community group that respondent supported in the *MichGO* litigation already had brought National Environmental Policy Act and IGRA challenges to the Secretary's decision to place the Bradley Tract into trust, and those claims were rejected by both the district court and the court of appeals. *MichGO*, 525 F.3d at 28-33. Neither the APA nor prudential standing principles permits plaintiffs to treat the Reorganization Act like an open vessel into which any and all citizen objections under any laws can be poured and litigated—or, actually, relitigated a second time.

The court of appeals deemed the Reorganization Act and IGRA to be sufficiently "linked" (Pet. App. 8a) to bypass the settled prudential standing rule that the plaintiff's interests must coincide with "the statutory provision * * * invoked in the suit," *Bennett*, 520 U.S. at 162. *See* Pet. App. 8a. That was wrong.

First, the Court has only employed an "integral relationship" bridge to support prudential standing when the two statutory provisions are *within the*

same statute. *Air Courier Conference*, 498 U.S. at 529-530.

Indeed, the court of appeals' invocation of *Air Courier Conference* (Pet. App. 9a) to support its prudential-standing merger of IGRA with the Reorganization Act is hard to understand because that case expressly precludes the very sort of statutory "leapfrog[ging]" that occurred here—that is, importing interests under one statute to support prudential standing under another. 498 U.S. at 530. Much like respondent, the plaintiffs in *Air Courier Conference* argued that they had prudential standing to sue under the Postal Express Statutes because those laws were reenacted as part of another law, the Postal Reorganization Act, the zone of interests of which the plaintiffs fell within. *Id.* at 528-529.

This Court flatly rejected that argument, warning that "[t]o adopt" the plaintiffs' argument would make the Postal Reorganization Act the "'relevant statute'" for purposes of the zone-of-interests inquiry, even though the plaintiffs did not sue under that law and even though it was "united" with the Postal Express Statutes "only by the fact that [both laws] deal with the Postal Service." *Air Courier Conference*, 498 U.S. at 529-530. "It would be a substantial extension" of prudential standing law, the Court explained, to "defin[e] the 'relevant statute'" through reference to an entirely different statute from the statute on which a plaintiff sues. *Id.* at 530. To do so "could deprive the zone-of-interests test of virtually all meaning." *Id.*

So too here. "[T]he fact that [the Reorganization Act and IGRA both] deal with" Indians and their land, *Air Courier Conference*, 498 U.S. at 529-530,

cannot make up for the substantial gap between the injuries respondent alleges and the terms, purposes, and remedial reach of the Reorganization Act. *Cf. Bennett*, 520 U.S. at 175-176 (plaintiff cannot rely on "overall purpose" of a law to establish prudential standing; focus is on the "particular provision of law upon which the plaintiff relies"). Particularly here, where the leapfrogging follows a failed challenge under the statutes that do address respondent's concerns, it would turn the zone-of-interests test inside out if it were used to make one statute a proper vehicle for refighting already-rejected claims governed by an entirely different statutory scheme. That would transform prudential standing from a rule designed to respect congressional limitations into a mechanism for hybridizing laws that Congress chose to enact as distinct statutory schemes.

Second, the court of appeals' newly minted, inter-statute "linkage" test for prudential standing is standardless and inadministrable. It offers no workable rule for determining when statutory lines should or should not be judicially blurred for prudential standing purposes. Nor could it. Here, the relevant congressional judgment is the legislative determination to house the rules for gaming in a *different* statute with *different* rules and *different* procedures helmed in part by a *different* agency (the National Indian Gaming Commission). 25 U.SC. § 2702. At bottom, the court of appeals erred by attempting to make the same that which Congress had made different.

Third, yet another problem with trying to conglomerate statutes to establish prudential standing is that it creates a gap between the injuries

alleged and the ability of judicial enforcement to redress those injuries. The requirement that plaintiffs demonstrate that judicial relief will redress the injuries asserted is a core requirement of Article III standing. *See, e.g., Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Prudential standing requirements must reinforce that judicial redressability requirement, just as they closely enforce Article III's injury requirement.

When the plaintiff's injury and the interests served by the statute sued under coincide, the remedial sufficiency of the law tends to follow from the statute's zone of interests. The two go hand in hand. For example, a plaintiff would have prudential standing to bring an APA challenge for alleged violations of IGRA in connection with agency approval of a gaming license because, if successful, the plaintiff's claim would redress injuries from gaming by preventing or halting the gaming operation.

Not so when plaintiffs are permitted to hopscotch across different statutes to establish prudential standing. The decision to place land into trust under the Reorganization Act does not license (or prohibit) gaming. Gun Lake's authority to conduct gaming arose from separate decisions by the federal government, including the National Indian Gaming Commission under IGRA, and the state government through its adoption of a gaming compact with Gun Lake. Respondent challenges neither of those decisions.

Furthermore, stripping the United States of its trust title by taking the land out of trust is a blunderbuss response to gaming and aesthetic

injuries that Congress never intended or designed the Reorganization Act to redress. To begin with, taking the land out of trust would not independently determine whether gaming could go forward. It would say nothing about whether a private, non-tribal company could continue to operate this profitable casino that is providing critically needed economic rejuvenation in Michigan. That, as well as the ability of Gun Lake to obtain state authorization to game off of trust lands, would be dictated entirely by state law, not the Reorganization Act or any federal law.

This Court has long held, however, that standing cannot be established when relief depends critically on the actions of third parties. *See Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 106 n.7 (1998); *Simon*, 426 U.S. at 41-42. Prudential standing to enforce a federal law, likewise, should exist only when the remedy is provided directly by the statute being invoked. That is because, as a federal law, redressability should exist uniformly across the Nation rather than turn on and off based on the vagaries of state law.

Fourth, de-trusting the land and surrendering the United States' title far overshoots any alleged environmental or gaming injuries, especially given that nearly three-quarters of the land at issue is not used for the casino. Tellingly, the National Environmental Policy Act allows tribes and the government to address that statute's environmental concerns through more targeted and tailored adjustments in casino operations. It is not the all-or-nothing decision that using the Reorganization Act's trust authority would inflexibly impose.

The overreaching and heavy-handed effects of taking land out of trust, its repercussions for the many unchallenged tribal development and governmental operations on the majority of the trust land, its wooden inflexibility in resolving environmental objections, and the harm it would inflict on surrounding communities that depend on the stability of the United States' title for their own governmental and business planning, all underscore that Congress never intended the Reorganization Act to redress interests like respondent's that are so disconnected from the Act's text, operative provisions, and purposes.

In short, just as respondent has attempted to use the APA to obtain relief that Congress expressly forbade in the QTA, so here is respondent attempting to wring out of the Reorganization Act a far more suffocating and ill-fitted remedy than Congress intended under the on-point statutes, IGRA and the National Environmental Policy Act, that actually do address the injuries respondent alleges. Given that, it cannot "reasonably be assumed that Congress intended to permit" respondent to sue for an oversized remedy to address injuries foreign to the terms and purposes of the Reorganization Act's land-into-trust provision. *Clarke*, 479 U.S. at 399. Prudential standing principles have never permitted piggybacking statutory schemes as a means of alchemizing legally foreclosed claims under one statute into a viable APA claim under another statute that—unsurprisingly—is ill-adapted to redress harms that the law does not address.

B. Respondent's Interest In Policing Compliance With Federal Law Does Not Cure His Prudential Standing Problem

The court of appeals held that, regardless of whether the Reorganization Act was "intended to benefit" respondent, prudential standing properly devolved on him because his interests are "cognizable," Pet. App. 11a, and he "can be expected to police the interests that the statute protects, " *id.* at 6a. The court reasoned that respondent "can be expected to police" the Secretary's decision to place lands in trust because "his stake in opposing [Gun Lake's] casino is intense and obvious." *Id.* at 11a. Rather than cure respondent's prudential standing problem, that makes it worse by effectively collapsing prudential and Article III standing. If all prudential standing requires is a cognizable Article III injury and a law-enforcing motivation, then prudential standing will be reduced to a jurisdictional Maginot line.

The requirement that respondent's injuries be "cognizable" (Pet. App. 11a) is no protection. Article III already requires that. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992). The whole point of prudential standing is that it requires more. *See, e.g., National Wildlife Fed'n*, 497 U.S. at 883 ("[T]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not

those of the reporters, that company would [not have prudential standing under the statute].").

Nor is there any administrable substance to the court of appeals' supposition that it can independently discern whom Congress expected to "police" agency compliance with the law and whom it did not. The whole reason that prudential standing doctrine has long insisted on alignment between the plaintiff's asserted interests and the statute's textual zone of interests and remedial reach is because that is the best evidence of whom Congress wanted to enforce its laws and, more specifically, whether Congress intended to "grant[] persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. Having unplugged its prudential standing analysis from that traditional inquiry, however, the court of appeals offered no explanation of how courts are supposed to independently determine which plaintiffs with arguable Article III injuries have—and which do not have—a sufficiently "intense and obvious" interest (Pet. App. 11a) in the law to pass that court's prudential standing threshold.

In addition, the court's emphasis on respondent's "intense" desire to "police" agency compliance with the law cannot be reconciled with the ample Article III precedent holding that "the essence of standing 'is not a question of motivation but of possession of the requisite * * * interest.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.21 (1982). *See also Defenders of Wildlife*, 504 U.S. at 576 (Article III standing cannot be predicated on a plaintiff's interest in ensuring "executive officers' compliance with the

law"). Nowhere does the court explain why a factor considered irrelevant to the Article III standing question could play such a central role in establishing prudential standing.

Finally, the court of appeals' reliance (Pet. App. 7a-8a) on the Interior Department notice regulation implementing Section 465 was misplaced. *See* 25 C.F.R. § 151.12(b). The court reasoned that, because the regulation affords "affected members of the public" an opportunity to seek judicial review before the Secretary places land into trust, the regulation signifies that "individuals like [respondent] who live close to proposed gaming establishments" fall within the Reorganization Act's zone of interests. Pet. App. 8a-9a.

That far overreads the regulation. It simply allows APA challenges to be brought under any properly invoked statute, not necessarily the Reorganization Act, before the QTA cuts off jurisdiction. 61 Fed. Reg. 18,082 (April, 24, 1996) (notice requirement "allows interested parties to seek judicial or other review under the Administrative Procedure Act"). Thus, had respondent complied with the regulation's 30-day window, the regulation would have allowed him to file an APA challenge under IGRA before title to the Bradley Tract transferred to the United States and the QTA attached, because his alleged injuries appear to fall within IGRA's zone of interests.

The regulation thus does nothing more than leave the window to judicial review open for those who otherwise have standing to bring suits. It certainly was never meant to transmogrify all legal objections to a trust decision under other statutes into viable

and remediable claims under the Reorganization Act. Indeed, in its Federal Register notice promulgating the regulation, the Interior Department did not even refer to judicial review under Section 465. The only basis for judicial review referenced in the notice was a possible constitutional challenge under the "non-delegation" doctrine. *See* 61 Fed. Reg. 18,082 (April 24, 1996) (citing *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *cert. granted and judgment vacated sub nom. Department of the Interior v. South Dakota*, 519 U.S. 919 (1996)).

Likewise, the Secretary's announcement of her decision to place the Bradley Tract into trust under Section 465 did not refer to a possible Section 465 challenge or in any way regulatorily expand the Reorganization Act's zone of interests. Rather, the announcement focused on the proposed use of the land for a gaming operation and concluded that such a use of the land complied with IGRA and the National Environmental Policy Act. 70 Fed. Reg. 25, 596 (May 12, 2005). Thus, if anything, the announcement invited challenges under those two statutes, which is how the plaintiff in *MichGO* proceeded. 525 F.3d at 26.[14]

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[14] The court of appeals also cited to 25 C.F.R. § 151.10(c) & (f). Pet. App. 10a. But the considerations listed in Section 151.10 simply flesh out the factors the Secretary will weigh in his or her discretion in determining whether the trust acquisition would fulfill the statutory purposes outlined in 25 C.F.R. § 151.3. "The purposes for which the land will be used," 25 C.F.R. § 151.10(c), bear obvious relevance to determining whether the trust acquisition actually will "facilitate tribal self-determination, economic development, or Indian housing," 25 C.F.R. § 151.3(a)(3). Likewise, the consideration of

Beyond that, the prudential standing doctrine requires a plaintiff challenging agency action under a statute to fall within the zone of interests of the "'relevant statute.'" *National Wildlife Fed'n*, 497 U.S. at 883. A plaintiff cannot establish prudential standing by dint of a regulation because the zone-of-interests requirement enforces and respects Congress's legislative judgments, not Executive Branch policies. If Congress did not intend to include a plaintiff within the zone of interests of a statute, an administrative agency cannot amend the statute's reach via regulation. *See American Fed'n of Gov't Employees v. Rumsfeld*, 321 F.3d 139, 145 (D.C. Cir. 2003) ("[R]egulations * * * are not statutes, and thus cannot confer [prudential] standing[.]").[15]

"[j]urisdictional problems and potential conflicts of land use," 25 C.F.R. § 151.10(f), equally informs the tribal development goals and a balanced assessment of the acquisition's impact on the "state and local governments having regulatory jurisdiction over the land to be acquired," 25 C.F.R. § 151.10, which is a central function of that regulation. Because private individuals, unlike state and local governments, are not given advance notice of tribal applications for trust acquisitions, this regulation does not create a mandate for objections like respondent's to dictate the Secretary's initial trust decision. Even less so could it control the only relevant question here, which is whether the Reorganization Act's statutory provisions and purposes coincide with respondent's private gambling and aesthetic interests.

[15] While Gun Lake did not dispute respondent's Article III standing at the pleading stage, Gun Lake intends to do so should this case proceed any further procedurally. *See Defenders of Wildlife*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of [Article III] injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts[.]") (*internal citations omitted*).

ADDENDUM

ADDENDUM

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5 U.S.C. § 702 ..... 6a

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United States Code

Title 28. Judiciary and Judicial Procedure

Part VI. Particular Proceedings

Chapter 161. United States as Party Generally

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346 (f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with

jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to

such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

United States Code

Title 5. Government Organization and Employees

Part I. The Agencies Generally

Chapter 7. Judicial Review

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

United States Code

Title 25. Indians

Chapter 14. Miscellaneous

Subchapter V. Protection of Indians and Conservation of Resources.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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Nos. 11-246 and 11-247

In the Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. 702 waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian tribe.

2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

PARTIES TO THE PROCEEDINGS

In No. 11-246, the petitioner is the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below. The respondents are David Patchak, plaintiff below, and Ken L. Salazar, Secretary of the Interior, and Larry Echo Hawk, Assistant Secretary of the Interior, Indian Affairs, defendants below.

In No. 11-247, the petitioners are Ken L. Salazar, Secretary of the Interior, and Larry Echo Hawk, Assistant Secretary of the Interior, Indian Affairs, defendants below. The respondents are David Patchak, plaintiff below, and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below.

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In the Supreme Court of the United States

No. 11-246

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

No. 11-247

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 632 F.3d 702.* The opinion of the district court (Pet. App. 27a-37a) is reported at 646 F. Supp. 2d 72.

* All references to "Pet. App." are to the appendix in No. 11-247.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2011. Petitions for rehearing were denied on March 28, 2011 (Pet. App. 23a-24a, 25a-26a). On June 15, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 11-246 to and including July 26, 2011, and on July 18, 2011, the Chief Justice further extended the time to August 25, 2011. On June 16, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 11-247 to and including July 26, 2011, and on July 18, 2011, the Chief Justice further extended the time to August 25, 2011. The petitions for a writ of certiorari were filed on August 25, 2011, and granted on December 12, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Band), also called the Gun Lake Band, is a federally recognized tribe in Allegan County, Michigan. See 75 Fed. Reg. 60,810, 60,811 (Oct. 1, 2010). Under the terms of the 1821 Treaty of Chicago, signed by Chief Match-E-Be-Nash-She-Wish, the Band ceded much of its land to the United States but reserved a tract of land at present-day Kalamazoo. Treaty of Chicago, 7 Stat. 219. In 1827, the Band ceded that parcel to the United States in exchange for the enlargement of one of the reserves of the Pottawatomi bands. Treaty of Sept. 19, 1827, 7 Stat. 305. Under subsequent treaties to

which the Band was not a signatory, all Pottawatomi land was ceded to the United States, leaving the Band landless. Treaty of Chicago, 7 Stat. 431 (1833); Ottawa Treaty, 7 Stat. 513 (1836).

In 1998, the Secretary of the Interior formally acknowledged the Band as a recognized tribe. 63 Fed. Reg. 56,936 (Oct. 23, 1998). In 2001, the Band submitted an application to the Department of the Interior in which it requested that the United States acquire in trust for the Band about 147 acres of land in Wayland Township, Michigan (the Bradley Property). Pet. App. 28a-29a. Its application was based on the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, which authorizes the Secretary of the Interior to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. Under Section 465, title to any lands or rights acquired pursuant to the IRA is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State or local taxation." *Ibid.*

In May 2005, after an extensive administrative review, Secretary Norton announced her decision to acquire the Bradley Property in trust for the Band. 70 Fed. Reg. 25,596-25,597 (May 13, 2005). The announcement stated that "acceptance of the land into trust" would not occur for 30 days, so that "interested parties [would have] the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." *Ibid.*; see 25 C.F.R. 151.12(b).

2. During that 30-day period, an organization known as Michigan Gambling Opposition (MichGO) sued the

Secretary, alleging that her decision violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, as well as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and that 25 U.S.C. 465 is an unconstitutional delegation of legislative authority to the Executive. The district court rejected those claims. *Michigan Gambling Opposition (MichGO)* v. *Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007).

MichGO appealed, and after oral argument, it attempted to add a claim that the land acquisition was not authorized under 25 U.S.C. 465 because, according to MichGO, the Gun Lake Band was not under federal jurisdiction in 1934. See *Carcieri* v. *Salazar*, 555 U.S. 379, 382 (2009) (holding that the IRA "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934"). The court of appeals denied MichGO's motion to supplement the issues on appeal, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. Mar. 19, 2008), and then affirmed the district court's decision, *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), cert. denied, 555 U.S. 1137 (2009).

3. Respondent Patchak lives in Wayland Township, Michigan, "in close proximity to" the Bradley Property. J.A. 30. In 2008, a week after the court of appeals denied rehearing en banc in *Michigan Gambling Opposition*, and more than three years after MichGO filed its complaint, Patchak brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, advancing the argument that MichGO had attempted to raise in its appeal—*i.e.*, that the acquisition was not authorized by the IRA because the Band was not under

federal jurisdiction in 1934. At the time Patchak filed his suit, title to the land had not yet been transferred to the United States in trust for the Band. When Secretary Kempthorne announced that he intended to accept the land in trust for the Band once the court of appeals issued its mandate in *Michigan Gambling Opposition*, Patchak requested that the district court order an "administrative stay of proceedings," which the district court denied. C.A. App. 64; J.A. 6-7. Patchak subsequently moved for a temporary restraining order prohibiting the trust acquisition, but the district court denied that motion as well. J.A. 11. On January 30, 2009, the Secretary accepted title to the Bradley Property in trust for the Band. Pet. App. 3a.

The district court dismissed Patchak's complaint. Pet. App. 27a-37a. The court held that Patchak lacked prudential standing because the injury he alleged—namely, that the gaming facility the Band proposed to operate "would detract from the quiet, family atmosphere of the surrounding rural area," *id.* at 30a n.5—was not arguably within the zone of interests protected by the IRA, *id.* at 34a-36a. The court stated that its subject-matter jurisdiction was "seriously in doubt" for the additional reason that the United States has not waived its sovereign immunity to suits challenging its title to Indian trust lands. *Id.* at 37a n.12.

4. The court of appeals reversed and remanded. Pet. App. 1a-22a. The court held that Patchak had prudential standing, reasoning that the IRA "limit[s] the Secretary's trust authority," and "[w]hen that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably pro-

tected." *Id.* at 7a. The court explained that, in reaching that conclusion, it "ha[d] not * * * viewed the IRA provisions in isolation." *Id.* at 8a. Instead, because the court viewed those provisions as "linked" to IGRA, it evaluated Patchak's interests in light of the Band's intended use of the property for gaming. *Ibid.* "Taken together," the court concluded, "the limitations in [the IRA and IGRA] arguably protected Patchak from the negative effects of an Indian gambling facility." *Ibid.* (internal quotation marks omitted).

The court of appeals also held that Patchak was a "proper entity to police the Secretary's authority to take lands into trust under the IRA." Pet. App. 9a. The court reasoned that if the interests of a State or municipality—which might lose regulatory authority or tax revenue as a result of a trust acquisition—are within the zone of interests protected by the IRA, "then so are Patchak's interests," because his alleged injuries "may be different, but they are just as cognizable." *Id.* at 10a. The court stated that the injuries Patchak alleged, including loss of property value, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land surrounding the casino site," are the "sorts of injuries [that] have long been considered sufficient for purposes of standing." *Ibid.*

The court of appeals next held that 5 U.S.C. 702 waived the government's sovereign immunity from Patchak's suit. Pet. App. 10a-21a. Section 702 waives sovereign immunity for any "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702. The government contended that Patchak's suit was barred

by the last sentence of Section 702, which provides that "[n]othing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.* The government argued that the Quiet Title Act (QTA), 28 U.S.C. 2409a, is such a statute. The QTA provides that the United States may be sued "to adjudicate a disputed title to real property in which the United States claims an interest," but it goes on to say that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a).

The court of appeals rejected the government's argument. Observing that "a common feature of quiet title actions is missing from this case" because Patchak was not claiming title to the land at issue, Pet. App. 14a, the court concluded that "the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit," *id.* at 16a. In so holding, the court acknowledged that its decision created a conflict with decisions of three other circuits. *Id.* at 18a (citing *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United States*, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)).

SUMMARY OF ARGUMENT

This lawsuit should be dismissed for either of two independent reasons: first, the United States has not waived its sovereign immunity from suits, such as this one, challenging its title to Indian trust lands; and second, Patchak lacks prudential standing because the in-

jury he alleges is not within the zone of interests protected by the statutory provision on which he relies.

I. The United States is immune from suit in the absence of an express waiver of that immunity by Congress. In 1972, Congress enacted the Quiet Title Act to permit the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). That waiver of immunity, however, is accompanied by important limitations. It "does not apply to trust or restricted Indian lands," *ibid.*, and it makes relief available only to a plaintiff who claims some "right, title, or interest" in the property, 28 U.S.C. 2409a(d). Because this case involves land held by the United States in trust for an Indian tribe, and because Patchak does not himself claim any interest in the land at issue, the QTA does not permit this suit.

Patchak instead relies on the waiver of sovereign immunity provided in the 1976 amendments to the Administrative Procedure Act, 5 U.S.C. 702. By its terms, however, that provision does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.* The QTA is just such a statute, and the APA's waiver of sovereign immunity is therefore inapplicable here. That conclusion is supported by the legislative history of the amendments to Section 702, which makes clear that, as then-Assistant Attorney General Scalia put it, "in most if not all cases where statutory remedies already exist, these remedies will be exclusive." S. Rep. No. 996, 94th Cong., 2d Sess. 27 (1976). And it is compelled by this Court's precedent establishing that "Congress intended the QTA to provide the exclusive means by which adverse claimants could chal-

lenge the United States' title to real property." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) (quoting *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983)).

The court of appeals believed that the limitations in the QTA are irrelevant here because Patchak does not seek to quiet title in himself. That is incorrect. Patchak seeks an order compelling the United States to relinquish the United States' trust title to the land at issue, and therefore "the relief which is sought," 5 U.S.C. 702, is exactly the relief that the QTA forbids. The court of appeals' analysis also fails to take account of the purposes of the QTA's "Indian lands" exception—the effect on tribal interests from an order compelling the divestiture of trust land would be no less simply because the order was issued at the behest of a plaintiff who did not himself claim an interest in the land. Nor is there any reason to believe that Congress intended to create a regime in which anyone except an adverse claimant is free to challenge the United States' title to trust lands by suing an officer of the United States under the APA. Such a regime would cause serious practical problems and would enable ready circumvention of the carefully crafted limits on the QTA's waiver of sovereign immunity.

II. The doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In this case, that statutory provision is Section 5 of the Indian Reorganization Act, which authorizes the Secretary to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. But that provision has nothing

to do with the interests asserted in Patchak's suit, which involve the effect of gaming—conducted under a different statute—on nearby landowners. Although State and local governments would have prudential standing to challenge a land acquisition because they can lose some taxing and regulatory authority when land is taken into trust, the State of Michigan and the relevant local governments have all supported the Secretary's action. Patchak apparently takes a different view, but his asserted interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

In reaching a contrary conclusion, the court of appeals erred by failing to limit its zone-of-interests analysis "to the particular provision of law upon which the plaintiff relies." *Bennett* v. *Spear*, 520 U.S. 154, 175-176 (1997). Instead, the court evaluated the interests protected by the Indian Gaming Regulatory Act, an entirely different statute enacted decades after the IRA, and it also looked to regulations that Patchak does not even seek to enforce.

The court of appeals further erred by conflating Article III and prudential-standing principles. Noting that a State has prudential standing to bring a suit alleging a violation of 25 U.S.C. 465, the court reasoned that Patchak's alleged injuries are "just as cognizable." Pet. App. 10a. But alleging a cognizable injury is a requirement of Article III standing; the zone-of-interests test imposes an additional requirement that Patchak has failed to satisfy in this case.

ARGUMENT

I. THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FROM SUITS CHALLENGING ITS TITLE TO INDIAN TRUST LANDS

In this suit, Patchak seeks an order reversing the Secretary's acquisition of the Bradley Property as Indian trust land. His suit challenges the United States' trust title to the property and, if successful, would divest the United States of that title. "The basic rule of federal sovereign immunity," however, "is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Because neither the Quiet Title Act, 28 U.S.C. 2409a, nor the Administrative Procedure Act, 5 U.S.C. 702, waives the sovereign immunity of the United States in the circumstances presented here, Patchak's suit is barred by sovereign immunity.

A. The Quiet Title Act Prohibits The Relief Sought In This Case

Before the QTA was enacted, suits challenging the government's title to land were barred by principles of sovereign immunity. See *Block*, 461 U.S. at 280-282. In 1972, Congress enacted the QTA to waive sovereign immunity in order to permit the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." Act of Oct. 25, 1972, Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (28 U.S.C. 2409a). But Congress accompanied that waiver of immunity with several important limitations, two of which are particularly relevant here.

First, the QTA states that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C.

2409a(a). The statute thereby "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *United States* v. *Mottaz*, 476 U.S. 834, 842 (1986); see *Block*, 461 U.S. at 283. Second, the QTA makes relief available only to plaintiffs who themselves claim a personal interest in the land at issue: in a QTA proceeding, "[t]he complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstances under which it was acquired." 28 U.S.C. 2409a(d).

This case involves land held by the Secretary in trust for an Indian tribe, and it therefore falls within the QTA's exception for "trust or restricted Indian lands." 28 U.S.C. 2409a(a). Moreover, Patchak does not himself claim any "right, title, or interest" in the land. 28 U.S.C. 2409a(d). Accordingly, the relief that he seeks—an order compelling the Secretary to relinquish trust title to the land—is prohibited by the QTA.

B. Patchak May Not Invoke 5 U.S.C. 702 To Circumvent The Quiet Title Act's Limitations

In the 1976 amendments to the APA, Congress enacted a waiver of the federal government's sovereign immunity from suits seeking judicial review of certain agency action and requesting relief other than money damages. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (5 U.S.C. 702). As amended, Section 702 provides that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the

United States or that the United States is an indispensable party." 5 U.S.C. 702. At the same time, however, Congress was careful to preserve the limitations prescribed in other statutes in which it had waived sovereign immunity for particular classes of cases. To that end, the last sentence of Section 702 provides that "[n]othing herein"—that is, nothing in the APA's waiver of sovereign immunity—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.*

Although the court of appeals correctly recognized that Patchak's suit may not proceed under the QTA, it nevertheless held that Patchak may invoke the waiver of sovereign immunity set out in Section 702. That conclusion is contrary to the statutory text, the legislative history, and this Court's precedents.

1. Even in the absence of the limitation specified in the last sentence of Section 702, general principles of statutory interpretation would establish that a plaintiff may not rely on the APA to circumvent the specific limitations prescribed in the QTA. This Court has held, "[i]n a variety of contexts," that "a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *GSA*, 425 U.S. 820, 834 (1976); accord *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007); *Preiser* v. *Rodriguez*, 411 U.S. 475, 488-490 (1973). Most recently, in *Hinck* v. *United States*, 550 U.S. 501 (2007), the Court held that a suit to abate interest on federal taxes could be brought only in the Tax Court under a special provision of the Internal Revenue Code, and not under the Tucker Act, 28 U.S.C. 1491(a)(1). 550 U.S. at 506-507. The Court observed that the Internal Revenue Code provision already "provide[d] a forum for adjudication, a limited class of poten-

tial plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." *Id.* at 506; see, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that Medicare reimbursement disputes are governed by the "precisely drawn provisions" of the Medicare statute rather than the Tucker Act).

Similarly, in *Brown*, the Court held that Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (1970 & Supp. IV 1974), provides the exclusive remedy for claims of discrimination in federal employment. 425 U.S. at 835. In reaching that conclusion, the Court emphasized that, before Section 717 was enacted, it was doubtful whether any judicial relief would have been available for such claims, and Congress apparently believed that none was. *Id.* at 826-828. For that reason, and taking into account the "balance, completeness, and structural integrity" of Section 717, the Court determined that the provision created an exclusive remedy and was not "designed merely to supplement other putative judicial relief." *Id.* at 832.

The same considerations are present here. Before the QTA was enacted, the United States had not "waive[d] its immunity with respect to suits involving title to land." *Block*, 461 U.S. at 280. Although some plaintiffs had attempted to circumvent the immunity of the United States by suing individual federal officers in disputes over land ownership, "the officer's suit ultimately did not prove to be successful" as a means to bring such claims. *Id.* at 281; see *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962). Accordingly, the Congress that enacted the QTA determined that "[b]ecause of the common law doctrine of 'sovereign immunity,' the United States cannot now be sued in a land title action without giving its express consent." S. Rep. No. 575, 92d Cong.,

1st Sess. 1 (1971) (*1971 Senate Report*); see *Brown*, 425 U.S. at 828 ("[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."). In response, Congress enacted the QTA, including its "carefully crafted" limitations, such as the "Indian lands exception," that were "deemed necessary for the protection of the national public interest." *Block*, 461 U.S. at 284-285. As this Court observed in *Block*, "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 285 (quoting *Brown*, 425 U.S. at 833). That is especially so in light of the principle "that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Id.* at 287. It follows that the QTA displaces the APA's more general waiver of sovereign immunity in cases, such as this one, involving a dispute over the United States' title to land.

2. To the extent there is any doubt about the relationship between the QTA and the APA, the last sentence of Section 702 confirms that a plaintiff may not rely on Section 702 to circumvent the limitations in the QTA: the QTA is an "other statute that grants consent to suit" but "expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702. Indeed, as noted above, the QTA expressly precludes the relief Patchak seeks for two different reasons. First, the QTA "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842; see 28 U.S.C. 2409a(a). Second, the QTA permits challenges to the

United States' claim of title to real property to be brought only by parties who themselves claim an interest in the same property. See 28 U.S.C. 2409a(d). The waiver set out in Section 702 is therefore inapplicable here, and Patchak's suit is barred by sovereign immunity.

3. The legislative history of Section 702 reinforces the conclusion that is compelled by its text. When Congress amended Section 702 in 1976, it adopted a proposal of the Administrative Conference of the United States. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4, 12, 23-24, 26-28 (1976) (*1976 House Report*); S. Rep. No. 996, 94th Cong., 2d Sess. 3, 12, 22-23, 25-27 (1976) (*1976 Senate Report*). In a memorandum supporting its proposal, the Administrative Conference had pointed out that its "recommendation [was] phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes * * * in which Congress has conditionally consented to suit." *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 138-139 (1970) (*1970 APA Hearing*). The Administrative Conference observed that "this result would probably have been reached by the preservation of all other 'legal or equitable ground[s]' for dismissal," *id.* at 139, in clause (1) of the last sentence of Section 702, which states that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702. But the Administrative Conference explained that "clause (2) of the final sentence of part (1) of the recommendation,"— that is, the clause referring to "any other

statute that * * * expressly or impliedly forbids the relief which is sought"—"is intended to prevent any question on this matter from arising." *1970 APA Hearing* 139.

As originally introduced in the Senate, the APA bill varied from the Administrative Conference's proposal in a significant respect: its version of Section 702 would have withheld authority to grant relief only if another statute "forbids the relief which is sought," rather than if it "*expressly or impliedly* forbids the relief which is sought," as the Administrative Conference had proposed. *1976 Senate Report* 12, 26. On behalf of the Department of Justice, then-Assistant Attorney General Scalia urged Congress to restore the phrase "expressly or impliedly." *Id.* at 26-27. As he explained, waiver statutes enacted before 1976 were passed against the background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular waiver statute. *Ibid.* Assistant Attorney General Scalia observed that "this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *Id.* at 27. That result, he concluded, is "simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." *Ibid.*

In response to Assistant Attorney General Scalia's letter, the Senate Committee amended the provision to conform to the Administrative Conference's proposal, *1976 Senate Report* 12, and the bill passed the House of Representatives and the Senate in that form. That history confirms that, under Section 702, "where statutory remedies already exist, these remedies will be exclu-

sive." *Id.* at 27; see *id.* at 12 ("This language makes clear that the committee's intent to preclude other remedies will be followed with respect to *all* statutes which grant consent to suit and prescribe particular remedies.") (emphasis added).

4. This Court has twice held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Mottaz*, 476 U.S. at 841 (quoting *Block*, 461 U.S. at 286). And in *Block*, it specifically rejected the suggestion that a plaintiff may invoke the waiver of sovereign immunity in Section 702 as a means of avoiding the limitations on the waiver of sovereign immunity under the QTA. 461 U.S. at 286 n.22. The Court reasoned that the QTA is an "other statute" granting consent to suit within the meaning of 5 U.S.C. 702, so that if a suit is untimely under the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g), then "the QTA expressly 'forbids the relief' which would be sought under [Section] 702," 461 U.S. at 286 n.22. See *ibid.* (Section 702 "provides no authority to grant relief 'when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy.'") (quoting *1976 House Report* 13).

Like *Block*, this case involves a suit that is within the general subject matter addressed by the QTA but is foreclosed by the specific limitations of the QTA. Under *Block*, Patchak cannot evade those limitations by invoking Section 702.

C. Patchak's Lack Of Any Interest In The Bradley Property Is Not A Basis For Permitting Him To Challenge The Government's Trust Title To That Land

The court of appeals noted that "a common feature of quiet title actions is missing from this case" because Patchak does not claim any ownership interest in the land at issue. Pet. App. 14a. From that observation, the court reasoned that "the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit." *Id.* at 16a. In the court's view, this is not "the sort of 'action under this section'"—*i.e.*, the QTA—"for which the United States has waived sovereign immunity except with respect to Indian lands." *Id.* at 12a-13a (quoting 28 U.S.C. 2409a(a)). The court therefore concluded that the QTA is not a statute forbidding relief in these circumstances, and that Section 702 "has waived the government's immunity from suit." *Id.* at 13a. That reasoning is flawed.

1. Section 702's waiver of sovereign immunity is inapplicable because the Quiet Title Act "forbids the relief which is sought" in Patchak's suit

a. The principal error in the court of appeals' analysis is that it focuses on the relief that Patchak does *not* seek—a determination that he owns the Bradley Property—rather than on the relief that he *does* seek, which is to set aside the Secretary's acquisition of the Bradley Property, to prevent the Secretary from holding the Bradley Property as Indian trust land, and thus to divest the United States of its title to the land. See J.A. 38 (asking the district court to "reverse the decision to take the Property into trust for the Gun Lake Band"); Patchak C.A. Br. 26 (describing the relief sought as including an instruction to the district court "to order the

Bradley [Property] taken out of trust"); Pet. App. 1a (characterizing Patchak's suit as one "to prevent the Secretary of the Interior from holding land in trust for an Indian tribe in Michigan"). The QTA's waiver of sovereign immunity allows district courts "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). That is precisely what Patchak has asked the district court to do in this case. His suit necessarily challenges the United States' trust title to the Bradley Property and, if successful, would require the United States to relinquish that title. As explained above, however, the QTA forbids a court from granting such relief, both because the land at issue is Indian trust land and because Patchak himself asserts no interest in it. And because the QTA is a statute that "grants consent to suit" but "forbids the relief which is sought," 5 U.S.C. 702, the APA's waiver of sovereign immunity is not available.

b. The court of appeals relied on the title of the QTA, "An Act to permit suits to adjudicate certain real property quiet title actions," 86 Stat. 1176, and it reasoned that, because a traditional quiet-title action is brought by an adverse claimant to land, the QTA is relevant only to proceedings brought by such a claimant. Pet. App. 13a-15a. But as the court recognized, the title of a statute cannot alter the meaning of its text. *Id.* at 14a; see *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998). Here, the text of the statute refers to the "adjudicat[ion]" of "disputed title[s] to real property in which the United States claims an interest"—exactly what Patchak seeks in this case. 28 U.S.C. 2409a(a).

The court of appeals' reliance on the QTA's title is particularly inappropriate in light of the statute's his-

tory. As enacted, the QTA was closely based on a draft bill proposed by the Department of Justice. The draft referred to "suits to adjudicate disputed titles to lands in which the United States claims an interest," a class of proceedings that unambiguously includes this case. *Suits to Adjudicate Disputed Titles to Land in Which the United States Claims an Interest: Hearing on S. 216 Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 51 (1972). When the bill was introduced in the Senate, however, that language was changed to the language now in the statute's title: "suits to adjudicate certain real property quiet title actions." *Ibid.* Testifying at a hearing on the bill, the Assistant Attorney General for the Land and Natural Resources Division noted the change but explained that "we do not see any substantive change resulting from the Senate's choice of language or from subsequent changes made solely to insure internal consistency." *Ibid.*; see *id.* at 59 (repeating that statement, without contradiction, in a colloquy with the subcommittee's chairman).

c. More importantly, the court of appeals' reasoning overlooks that the QTA was enacted against the background of a general rule of sovereign immunity. For the reasons explained by Assistant Attorney General Scalia, Congress would have seen no need expressly to forbid all relief to individuals who were not seeking to quiet title in themselves; the general rule of sovereign immunity already prevented those individuals from obtaining relief. *1976 Senate Report* 27. In other words, when Congress considered and enacted the QTA, Congress understood the background law to prevent *anyone* from challenging the United States' title to *any* land, and it

sought to provide adverse claimants, and no others, with an action against the United States in limited circumstances. Yet Congress determined that even adverse claimants were to be barred from bringing suit if their claims involved trust or restricted Indian lands. Thus, at a minimum, the QTA "impliedly" precludes relief in the circumstances of this case, and under 5 U.S.C. 702, the APA's waiver of sovereign immunity is inapplicable.

2. The purposes underlying the Quiet Title Act's "Indian lands" exception are fully applicable to suits such as Patchak's

The court of appeals' analysis also fails to take account of the purposes of the QTA's "Indian lands" exception. That provision reflects not only traditional sovereign-immunity principles as applied to Indian trust lands, see *Minnesota* v. *United States*, 305 U.S. 382, 385-387 (1939), but also a recognition that "Indian title is a matter of federal law and can be extinguished only with federal consent," *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974); see *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975).

Although the initial QTA bill contained no exception for Indian lands, Congress chose to adopt the exception contained in a draft bill submitted by the Department of Justice. *1971 Senate Report* 2; H.R. Rep. No. 1559, 92d Cong., 2d Sess. 4, 10 (1972) (*1972 House Report*). In urging the adoption of that provision, the Solicitor of the Interior observed that the government "has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements," in exchange for which "Indians * * * have often surrendered claims to vast tracts of land." *Dispute of Titles on Public Lands: Hearing on S. 216*

Before the Subcomm. on Public Lands of the Senate Comm. on Interior & Insular Affairs, 92d Cong., 1st Sess. 19 (1971). "A unilateral waiver of the defense of sovereign immunity as to this land," the Solicitor explained, would "abridge the historic relationship between the Federal Government and the Indians without the consent of the Indians." *Ibid.*; see *1971 Senate Report* 4; *1972 House Report* 13.

The decision below, however, countenances a significant "abridg[ment]" of that relationship. Although Patchak questions whether the Bradley Property *should be* held as Indian trust land, he does not dispute that it *is* so held. Yet the order he seeks in this case would divest the United States of its trust title to that land. The interference with tribal interests from such an order is no less harmful simply because it is issued at the behest of a plaintiff who does not himself claim an interest in the land. Nor is there any reason to believe that, just four years after having carefully protected tribal interests when it enacted the QTA, Congress would have swept those interests aside when it amended the APA.

By permitting suits such as this one to proceed, the court of appeals' interpretation of the APA would severely disrupt the Secretary's acquisition and retention of trust lands for Indians. The Secretary's regulations provide for a 30-day window for the initiation of litigation after the announcement of his intention to take land into trust. 25 C.F.R. 151.12(b); see 61 Fed. Reg. 18,082 (Apr. 24, 1996) (explaining that the purpose of the 30-day window is to "permit[] judicial review before transfer of title to the United States"). The reasoning of the court of appeals, however, would make that time limit meaningless. Instead, any plaintiff who could establish standing but who did not claim to be the landowner

would be able to bring an APA challenge to any trust acquisition within the preceding six years. 28 U.S.C. 2401(a). That would be true whether the land was taken into trust under the Secretary's general authority under the Indian Reorganization Act, 25 U.S.C. 465, or under specific legislation enacted to provide a land base for a particular group of Indians. See, *e.g.*, Graton Rancheria Restoration Act, Pub. L. No. 106-568, Tit. XIV, 114 Stat. 2939 (25 U.S.C. 1300n to 1300n-6). That six-year period of uncertainty as to whether a trust acquisition would be subject to judicial challenge—and hence whether the land would securely be held in trust for the tribe—would pose significant barriers to tribes seeking assurances concerning the status of trust lands and their ability to promote investment and economic development on the lands. The circumvention of the QTA permitted by the court of appeals would therefore frustrate the purpose of trust acquisitions, which is to provide a land base for Indians in order to "encourag[e] tribal self-sufficiency and economic development." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (internal quotation marks omitted).

Indeed, the uncertainty surrounding the status of trust land arguably would not even end six years after the land is taken into trust. The implication of the court of appeals' reasoning is that, whenever the Secretary takes final agency action with respect to Indian trust land, such as approving a lease, plaintiffs (again, as long as they do not claim to own the land) can bring an APA suit contending that his action was contrary to law because the land is not properly held in trust for Indians. That might even be so when the United States has held the land in trust for years and the tribe has made substantial investments in it. Allowing such never-ending

attacks on the trust status of lands would severely undermine the United States' long-standing recognition of the central importance of tribal sovereignty, self-governance, and economic self-determination.

3. The United States has not waived its sovereign immunity from challenges to its title to land by plaintiffs who are not adverse claimants

Although the court of appeals was correct to observe that Patchak cannot bring an action under the QTA because he does not assert his own interest in the Bradley Property, it drew the wrong conclusion from that observation. Pet. App. 13a-16a; see 28 U.S.C. 2409a(d). In fact, Patchak's lack of interest in the property is another reason why no waiver of sovereign immunity permits this suit.

As explained above, the QTA makes relief available only to a plaintiff who asserts an interest in the land at issue: "The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstances under which it was acquired." 28 U.S.C. 2409a(d). That limitation is consistent with the QTA's overriding purpose of correcting the inequity formerly suffered by citizens who were "excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs." *1971 Senate Report* 1. In other words, the purpose of the QTA is to subject the United States' claim of title to adjudication by a court where there is a party who has an adverse claim to the same property and who would otherwise suffer the hardship of being unable to remove a cloud on his title to that property. *1976 Senate Report* 7. Without that limitation, the United States would be exposed to numerous

actions by various third parties who might wish to resolve a controversy concerning the United States' claim of title but who lack any competing claim to the same property. Such actions do not present the potential for hardship or concrete adversity regarding a particular parcel that, in Congress's judgment, warranted subjecting the United States to the burdens of suit concerning its title in the specified circumstances.

Moreover, the QTA's limited waiver allowing only plaintiffs asserting an interest in the land to bring suit is closely related to a limitation that addresses what had been "the main objection in the past to waiving sovereign immunity in this area"—namely, the possibility that a successful plaintiff could "force the United States from possession and thereby interfere with the operations of the Government." *1972 House Report* 6. To avoid that possibility, the QTA provides that, if the plaintiff prevails, "the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation." 28 U.S.C. 2409a(b). As the court of appeals acknowledged, that important protection of the government's possessory interests would make little sense if the suit were brought by someone other than the owner entitled to compensation. Pet. App. 16a. And under the court of appeals' interpretation of the APA, that protection apparently would cease to exist entirely in a case such as this: if Patchak prevailed in this case, the government would be obliged to give up its trust title to the Bradley Property, without the option of paying compensation to the former owner. That former owner is not "entitled" to the property,

28 U.S.C. 2409a(b), in light of its voluntary transfer of it to the United States, and is not a party to this case. As with the "Indian lands" exception, there is no reason to suppose that, in amending the APA in 1976, Congress intended to sweep away the protections it had carefully adopted just four years earlier.

In particular, nothing in Section 702 supports the illogical result of the decision below, under which anyone *except* an adverse claimant is free to challenge the United States' title to trust lands by suing an officer of the United States under the APA. Put another way, the court of appeals' holding leads to the perverse result that a party who claims no interest in the land at issue may sue to bar the United States from holding title to lands in trust for Indians, and to divest the United States of that title, even though the same suit would be barred if brought by a party who claimed an interest in the land. See *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F.3d 956, 962 (10th Cir. 2004) ("If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land."); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248, 1254-1255 (11th Cir. 1985) ("It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands."), cert. denied, 475 U.S. 1011 (1986).

In that regard, the court of appeals' position would have substantial adverse consequences outside the context of property that the United States claims as Indian trust lands. For example, in *Shawnee Trail Conser-*

vancy v. *United States Department of Agriculture*, 222 F.3d 383, 386-388 (7th Cir. 2000), cert. denied, 531 U.S. 1074 (2001), the plaintiffs alleged that the Forest Service lacked authority to restrict the use of certain roads in a national forest because, they said, the roads were subject to various easements and rights-of-way, and therefore the Forest Service did not "own the property rights necessary to make decisions concerning their incidents of use." *Id.* at 386. Even though the plaintiffs did not themselves claim any interest in those easements or rights of way, the Seventh Circuit correctly held that the QTA barred their suit. In reaching that conclusion, it agreed with "the majority of courts that have considered the QTA in the context of claims that do not seek to quiet title in the party bringing the action," but that "have nonetheless found the Act applicable." *Id.* at 388; see *id.* at 387 (discussing *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United States*, 490 U.S. 920 (1989)).

Under the reasoning of the court of appeals here, however, claims like those brought by the plaintiffs in *Shawnee Trail Conservancy* would be permissible, thereby subjecting the United States to numerous suits to adjudicate its title to real property even though no one in the suit has asserted a competing claim to the same property. Were the United States to lose those suits, it would be forced to cede title to non-parties to the litigation who might have no interest in owning the land. See, *e.g.*, *Southwest Four Wheel Drive Ass'n* v. *BLM*, 363 F.3d 1069, 1071 (10th Cir. 2004) (plaintiffs asserted that "the public" held "title to certain roads on federal land").

Worse still, the court of appeals's reasoning could allow easy circumvention of other limitations of the QTA. For example, suppose that a party claimed an interest in land that had been occupied by the United States for more than 12 years. Such a claim would be barred by the QTA's statute of limitations. See 28 U.S.C. 2409a(g). But the putative owner could grant a cooperative third party a license to engage in some activity on the land that was inconsistent with the federal claim of title. Assuming that the third party obtained a final agency action prohibiting him from engaging in the activity, he could then challenge that action under the APA on the ground that the government did not own the land. Because the third party would not be claiming to own the land himself, the reasoning of the court of appeals would seem to permit that challenge to proceed, even though its effect would be the same as a time-barred action under the QTA. Congress did not intend to permit such ready evasion of the QTA's carefully crafted limitations. Cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346-348 (1984).

II. PATCHAK LACKS PRUDENTIAL STANDING

To invoke the jurisdiction of a federal court, a plaintiff must satisfy the "irreducible constitutional minimum of standing" by showing that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (brackets, ellipses, and internal quotation marks omitted). In addition, this Court has recognized "judicially self-imposed limits on the exercise of federal jurisdiction," including the requirement that the plaintiff establish prudential standing. *Allen* v.

Wright, 468 U.S. 737, 751 (1984). As relevant here, the doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Bennett* v. *Spear*, 520 U.S. 154, 175-176 (1997); see 5 U.S.C. 702 (granting a right of review to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute"). Under that test, Patchak lacks standing to maintain this suit.

A. Patchak's Alleged Injuries Are Unrelated To The Interests Protected Or Regulated By Section 5 Of The IRA

1. In this case, "the statutory provision whose [alleged] violation forms the legal basis for [Patchak's] complaint," *National Wildlife Fed'n*, 497 U.S. at 883, is Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, which authorizes the Secretary to acquire interests in land "for the purpose of providing land for Indians." See J.A. 37-38 (citing the IRA as the basis for Patchak's complaint). According to Patchak, the Band was not "under Federal jurisdiction," 25 U.S.C. 479, when the IRA was enacted in 1934, so 25 U.S.C. 465 does not authorize the Secretary to acquire land in trust for it. J.A. 37; see *Carcieri* v. *Salazar*, 555 U.S. 379 (2009). But neither Patchak nor the court of appeals has suggested that the "interests to be protected or regulated" by that provision, *Bennett*, 520 U.S. at 175 (quoting *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)), have anything to do with the interests asserted in Patchak's suit—avoiding diminished property values, loss of "the rural character of the area," and loss

of "the enjoyment of the agricultural land" near the site on which the Band has built a gaming facility. Pet. App. 10a; see J.A. 30 (alleging that Patchak will be "injured by the negative effects of building and operating a massive casino in his community"). In fact, the provision allowing the Secretary to take land into trust only for tribes then "under Federal jurisdiction" was a limitation on the obligation of the federal government to provide for tribes and individual Indians, not a limitation designed to benefit surrounding communities or individual non-Indians. See *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government & Economic Enterprise: Hearings on S. 2755 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 2, at 265-266 (1934) (*IRA Hearing*). It follows that Patchak lacks prudential standing to maintain this suit.

2. Of course, that an individual such as Patchak lacks standing does not mean that there is no entity that could challenge a decision by the Secretary to acquire land in trust for Indians. Section 5 of the IRA provides that "[t]itle to any lands or rights acquired pursuant to this Act * * * shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465. One of the purposes of conferring that authority on the Secretary was to aid in providing a land base to Indians over which they might exercise self-government. See *IRA Hearing* Pt. 1, at 26 ("[T]his bill is designed * * * to provide for those Indians unwilling or unable to compete in the white world some measure of self-government in their own affairs."); *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23,

31 (D.C. Cir. 2008) ("Our review of the purpose and structure of the IRA confirms that * * * the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes."), cert. denied, 555 U.S. 1137 (2009). In this context, therefore, State and local governments could be said to be arguably within the zone of interests protected or regulated by 25 U.S.C. 465 because they stand to lose taxing authority and some regulatory authority as a result of the Secretary's trust acquisition. See *Nevada* v. *Hicks*, 533 U.S. 353, 361-362 (2001).

Significantly, the State of Michigan has not sued to oppose the trust acquisition here. To the contrary, it has entered into a gaming compact with the Band. 74 Fed. Reg. 18,397 (Apr. 22, 2009). Similarly, Allegan County and Wayland Township (where the property is located) have actively supported the trust acquisition and the Band's economic-development efforts. See Wayland Township, et al., Cert.-Stage Amicus Br. 1-3. Unlike the interests of those governmental entities, however, Patchak's interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). He should not be permitted to nullify the decision by the State and the local governments to support the Secretary's action.

B. The Court Of Appeals Erred In Analyzing The Interests Protected By Provisions Other Than The Statutory Provision Relied On By Patchak

This Court made clear in *National Wildlife Federation* that the zone-of-interests analysis is limited to the particular "statutory provision whose violation forms the

legal basis for [the] complaint." 497 U.S. at 883. Here, that provision is 25 U.S.C. 465, so the court of appeals should have focused its inquiry on that provision. Instead, the court erred by examining the interests protected by a separate statute and by regulations adopted by the Secretary.

1. Under *National Wildlife Federation*, it would have been inappropriate for the court to consider the interests protected even by other provisions of the IRA itself, outside of the one invoked by Patchak. As this Court explained in *Bennett*, "[w]hether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." 520 U.S. at 175-176. In any event, Patchak's interests do not even fall within the purposes of the IRA when the statute's other provisions are considered. The IRA repudiated the previous land policies of the Indian General Allotment Act, ch. 119, 24 Stat. 388, in that it prohibited any further allotment of reservation lands, 25 U.S.C. 461; extended indefinitely the periods of trust or restrictions on alienation of Indian lands, 25 U.S.C. 462; provided for the restoration of surplus unallotted lands to tribal ownership, 25 U.S.C. 463; and prohibited any transfer of Indian lands (other than to the tribe or by inheritance), except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations," 25 U.S.C. 464. The IRA's "overriding purpose" was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."

Morton v. *Mancari*, 417 U.S. 535, 542 (1974). Neither Patchak nor the court of appeals has identified any relationship between any of those interests and the injuries Patchak asserts.

2. What the court of appeals actually did in this case was even less justified than looking to other provisions of the IRA: the court evaluated what interests are protected by the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, an entirely different statute enacted in 1988, some 54 years after the IRA. Pet. App. 8a. The court of appeals attempted to justify its reliance on IGRA by asserting that the IRA's provisions are "linked" to those of IGRA, but that reasoning cannot withstand scrutiny. *Ibid.* It is true that the IRA and IGRA may be considered "linked" in the sense that one way for a tribe to operate a gaming facility (permitted by IGRA) is if the facility is located on land held in trust by the United States for the tribe (and acquired under the IRA or some other statute or treaty). But land may be taken into trust for a host of purposes that have nothing at all to do with gaming, as evidenced by the existence of 25 U.S.C. 465 and the Secretary's taking of land into trust under it for many years before IGRA was enacted. And even as to gaming, the presence of trust land is neither a necessary nor a sufficient condition for gaming to occur, because a tribe may conduct gaming on other lands, such as lands within an Indian reservation and restricted fee land, 25 U.S.C. 2703(4), and also because there are additional provisions of IGRA that must be satisfied before a tribe can operate a gaming facility.

More to the point, whatever incidental role the IRA's limitations may happen to play today with respect to "the interests of those * * * who would suffer from living near a gambling operation," Pet. App. 7a, there is

no reason to suppose that Congress could even have imagined those interests, let alone actually sought to protect them, when it enacted the IRA in 1934. There is accordingly no basis for concluding that those interests are even arguably "within the 'zone of interests' sought to be protected" by 25 U.S.C. 465. *National Wildlife Fed'n* 497 U.S. at 883.

Of course, where the Secretary has determined that land is eligible for gaming, an entity with Article III and prudential standing to challenge gaming on that land may bring a claim alleging that the determination violates IGRA. Indeed, MichGO brought just such a challenge, but it chose to abandon its IGRA claim on appeal. *Michigan Gambling Opposition*, 525 F.3d at 28. Should Patchak be able to identify some final agency action that he believes violates IGRA, he too could bring a claim alleging that IGRA was violated, if he establishes standing. His current suit, however, does not challenge the Bradley Property's eligibility for gaming under IGRA. His challenge based on the "under Federal jurisdiction" language in the IRA instead alleges that the Secretary could not acquire the Bradley Property in trust for the Band for any purpose.

3. To support its reliance on the purposes of IGRA, the court of appeals cited *Air Courier Conference* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991), but the court of appeals' analysis cannot be reconciled with this Court's decision in that case. Pet. App. 8a. In *Air Courier Conference*, postal-employee unions sought to challenge a regulation suspending restrictions in private-express statutes, which regulate the conduct of the Postal Service's competitors. 498 U.S. at 519-520. The unions argued that the suspension would harm their members' employment opportunities, and

they suggested that, in identifying the relevant zone of interests, the Court should look beyond the private-express statutes themselves to consider the broader Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, which codified those statutes. 498 U.S. at 528.

This Court rejected that suggestion. In so doing, the Court acknowledged that it had sometimes looked beyond the particular statutory provision invoked by a plaintiff to related provisions within the same statute. *Air Courier Conference*, 498 U.S. at 529. But the Court explained that "the only relationship between the [private-express statutes], upon which the Unions rel[ied] for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rel[ied] for their standing, [was] that both were included in the general codification of postal statutes embraced in the PRA." *Ibid.* To accept the unions' argument, the Court observed, would require holding that the PRA was the relevant statute for prudential standing, "with all of its various provisions united only by the fact that they dealt with the Postal Service." *Ibid.* The Court refused to apply that "level of generality" in conducting its prudential-standing analysis; to do so, it concluded, would "deprive the zone-of-interests test of virtually all meaning." *Id.* at 529-530.

Thus, far from supporting the decision below, *Air Courier Conference* confirms that, under this Court's precedents, there is no basis for the court of appeals' conclusion that the zone of interests arguably sought to be protected by the Congress that passed the IRA in 1934 encompasses interests reflected in a statute passed more than a half-century later. Just like the unions' argument that this Court rejected in *Air Courier Conference*, the court of appeals' theory here is that the IRA

and IGRA are related because they both deal with Indians and Indian tribes. That does not provide a basis for prudential standing.

4. Similarly without merit is the court of appeals' resort to the Secretary's regulations as a basis for holding that Patchak has standing. Pet. App. 8a-9a (citing 25 C.F.R. 151.10, 151.12). Those regulations prescribe procedures the Secretary has chosen to follow, and factors he has elected to take into account, when deciding whether to take land into trust for a tribe; the factors include "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. 151.10(f). But Patchak does not allege that the regulations were violated here, nor does he seek to enforce them in this case. Instead, his complaint is based solely on the IRA. J.A. 37-38. That the Secretary has made a discretionary decision to take potential conflicts of land use into account when determining whether to take land into trust for Indians does not mean that Congress intended to protect the interests of private landowners in the vicinity when it enacted 25 U.S.C. 465 itself.

C. The Court Of Appeals Erroneously Conflated Article III And Prudential Standing

The court of appeals further erred by conflating Article III and prudential standing principles. The court correctly observed that a State has prudential standing to bring a suit alleging a violation of 25 U.S.C. 465 because the limitations prescribed in the IRA serve to protect a State's interest in its regulatory authority over the land and tax revenues associated with the land. Pet. App. 9a-10a. According to the court, while "the nature" of a State's and Patchak's alleged injuries "may be different," Patchak's injuries "are just as cognizable." *Id.*

at 10a. But the court's reliance on "cognizable injury" misapplies an Article III standing requirement to the prudential standing issue presented here. While alleging a "cognizable injury" is a requirement of Article III standing, see *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), that an injury is cognizable for that purpose does not also establish that it falls within the zone of interests intended to be protected by the statutory provision giving rise to the claim, see *Clarke*, 479 U.S. at 395-396 (explaining that the prudential-standing requirement under the zone-of-interests test "add[s] to the requirement" that a plaintiff suffer an injury in fact).

For similar reasons, the court erred in relying on *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), for the proposition that the "sorts of injuries [Patchak asserts] have long been considered sufficient for purposes of standing." Pet. App. 10a. In *Sierra Club*, the Court considered whether the plaintiffs had satisfied the injury-in-fact requirement for standing under Article III, and it ultimately concluded that they had not. 405 U.S. at 734-740. Nothing in the Court's opinion addressed prudential standing, which is independent of Article III.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2012

APPENDIX

1. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 25 U.S.C. 465 provides:

Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

3. 28 U.S.C. 2409a provides:

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee

or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(*l*) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable wa-

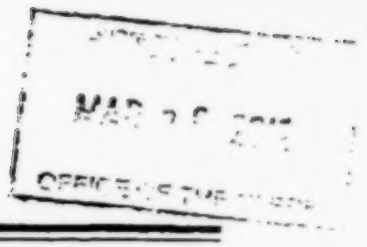
ters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS



Nos. 11-246 & 11-247

IN THE

Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF FOR RESPONDENT DAVID PATCHAK

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QUESTIONS PRESENTED

1. The Administrative Procedure Act waives sovereign immunity to allow citizens to challenge agency actions that violate federal law. Plaintiff David Patchak alleges that the Department of the Interior's (DOI) decision to take land into trust for the Gun Lake Band violates §465 of the Indian Reorganization Act (IRA) because the Band was not under federal jurisdiction in 1934, as required by this Court in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009). The Band therefore is not eligible to have land taken into trust under the IRA.

Although the Quiet Title Act (QTA) provides sovereign immunity for quiet-title actions concerning Indian lands, Patchak is not bringing a quiet-title action, as he asserts no ownership interest in the land at issue.

The question presented is whether the APA's sovereign-immunity waiver applies, or whether the QTA's sovereign-immunity provisions impliedly bar Patchak's claim even though his claim is outside the scope of the QTA.

2. Section 465 of the IRA and its implementing regulations limit the DOI's discretion in deciding whether to take land into trust. Petitioners do not contest Patchak's constitutional standing, but claim he is not within the IRA's zone of interests and therefore cannot challenge the DOI's land-in-trust decision.

The question presented is whether a plaintiff living in a community that will be negatively affected by the DOI's land-in-trust decision has prudential standing to enforce the IRA's limitations on land-in-trust decisions.

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BRIEF FOR RESPONDENT DAVID PATCHAK

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the statutes and regulations involved in this case—including 5 U.S.C. §702; 28 USC §§1346, 1402, and 2409a; 25 U.S.C. §§463, 465, and 2719; and 25 C.F.R. Part 151—are reproduced in the appendix to this brief.

STATEMENT

1. The Match-E-Be-Nash-She-Wish Band of the Pottawatomi Indians, commonly known as the Gun Lake Band, was not federally recognized when Congress enacted the Indian Reorganization Act (IRA) in 1934. 62 Fed. Reg. 38,113, 38,113 (June 23, 1997). For nearly 100 years before the IRA's enactment, the Band affirmatively avoided the United States' jurisdiction. This history is significant because in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), this Court held that the IRA allows the Department of the Interior (DOI) to take land into trust only for "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 1068.

In 1839, the Band placed itself under the protection of an Episcopalian mission to avoid the federal government's plan to move Indians west, and occupied lands in Allegan County, Michigan. J.A. 47–50. In 1855, the Pottawatomi signed the Treaty of Detroit, which required Band members to reside in Oceana County, Michigan, and most of the Band moved there. *Id.* at 48–49. But in 1870, the Band violated the treaty by returning to Allegan County, thereby breaking off the Band's relationship with the

federal government. Exhibit A to Patchak's COA Appellant's Br. As the DOI has previously determined, "[s]ince 1870, the Federal government has dealt with band members as individual Indians entitled to attendance at BIA schools, etc., but *has not dealt with the band as an entity*." *Id.* (emphasis added).

2. In 1993, the Band filed an application for federal recognition under 25 C.F.R. §83.7, which applies only to tribes that are not acknowledged or recognized by the federal government at the time of application, 25 C.F.R. §83.3(a). The Band therefore acknowledged that it lacked federal recognition before 1993. See COA J.A. 94 (stating "the federal government withheld formal acknowledgement beginning in 1870" and "[t]hus, for well over a century, the Tribe was denied both federal recognition and reservation lands . . . ."). Before this Court's decision in *Carcieri*, the federal government also acknowledged the Band's lack of federal recognition. *Id.* at 167. Thus, the Band was not under federal jurisdiction from 1870 to 1993.

When the Band applied for federal recognition, it internally agreed "there would never be casinos in our Tribe" and represented in its proposed constitution (submitted to the DOI) that it had "decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring." *Id.* at 925 (emphasis omitted). The Band received federal recognition in 1998. See 63 Fed. Reg. 56,936, 56,936 (Oct. 14, 1998).

3. Shortly after its recognition, the Band acquired a 165-acre site in rural Wayland Township (the Bradley Tract) in Allegan County on which it

wished to construct and operate a casino complex. J.A. 41; COA J.A. 47–48. In 2001, the Band applied to have the land taken into trust. In its application, the Band specifically stated that it "intend[ed] to offer Class II and/or Class III gaming (as defined by the IGRA, 25 U.S.C. §2701 *et seq.*) to the public at the facility." J.A. 61. The Band could not use its land for a casino complex, or any other use inconsistent with state or local laws, absent the federal government taking the Band's land into trust.

To comply with the National Environmental Policy Act (NEPA), the DOI conducted an environmental assessment to evaluate the land-in-trust decision's potential effects. COA J.A. 520. Because the proposed use for the land—here, casino gambling—is inextricably intertwined with the fee-to-trust decision, the DOI analyzed the effects of a gambling complex of nearly 200,000 square feet, including almost 99,000 square feet of gambling space, two sit-down restaurants, a café, two fast-food outlets, four retail shops, a sports bar, an entertainment lounge, office space, and parking for more than 3,330 vehicles. COA J.A. 535, 729. This casino complex, which would be open 24 hours a day, 365 days a year, is expected to draw 3.1 million visitors annually—to a farming community of 3,000 residents. *Id.* at 754, 577. Indeed, the casino would have more parking spaces—3,330—than Patchak's community has residents. See *id.* at 535, 729.

The casino was expected to attract 1,420 new residents and induce construction of more than 500 new homes in the area. *Id.* at 734. Although such substantial growth might be good news to some, this urbanization will destroy the rural character of Wayland Township and harm those residents, like

Patchak, who value a community free from the significant noise, traffic, and general disruption that accompany a sizeable casino complex.

4. Despite receiving numerous comments expressing concern about the effect of the thousands of gambling visitors on the community, *id.* at 779, 788, the DOI made a final agency determination on April 18, 2005, that it would acquire the Bradley Tract in trust for the Band. 70 Fed. Reg. 25,596, 25,596 (May 13, 2005). The notice of determination stated that, in accordance with IRA regulation 25 C.F.R. §151.12(b), DOI was giving notice to the public "at least 30 days prior to the signatory acceptance of the land into trust." *Id.*

5. Michigan Gambling Opposition (MichGO), a nonprofit organization of concerned citizens, filed suit and challenged the DOI's right to take the Bradley Tract into trust on a number of grounds, including failure to comply with the NEPA, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701 *et seq.*, and the IRA. MichGO's IRA claim alleged a violation of the non-delegation doctrine. The *MichGO* litigation resulted in a stay that prevented the DOI from taking the land into trust. Following this Court's grant of certiorari in *Carcieri*, the courts in the *MichGO* litigation refused to consider whether the DOI was barred from taking the Bradley Tract into trust because the Band was not under federal jurisdiction in 1934.

6. Before the DOI took the land into trust, David Patchak filed this suit against the DOI. Patchak sought review of the DOI's final agency decision under the Administrative Procedure Act (APA), 5 U.S.C. §§702, 706. He argued that the DOI lacked the authority under the IRA to take the land into

trust because the Gun Lake Band was not under federal jurisdiction in 1934.

Patchak, who lives near the Bradley Tract, moved to the area "because of its unique rural setting," and he "values the quiet life he leads in Wayland Township." J.A. 30–31. He anticipated that a casino would irreversibly change the area's rural character, depriving him of the enjoyment of the agricultural land and weakening the community's family atmosphere. J.A. 31. He recognized that a casino would increase traffic, crime, and pollution. J.A. 31. These adverse effects in turn would divert police, fire, and emergency medical services and cause both decreased property values and increased property taxes. *Id.* The presence of a casino would also likely divert community resources because of an increased need to treat gambling addiction and would lead to other problems that would detrimentally affect his community's rural character. *Id.* None of these effects could occur absent the government taking the Bradley Tract into trust.

7. The stay in the *MichGO* litigation expired when the Court denied MichGO's petition for a writ of certiorari. Accordingly, Patchak moved for a stay to prevent the DOI from taking the land into trust. The district court denied Patchak's motion. Two months after the argument in *Carcieri* and five weeks before this Court's decision, the DOI took the land into trust. The government then asserted that because it had taken the land into trust, sovereign immunity under the Quiet Title Act (QTA) cut off judicial review of Patchak's pending APA claim.

8. The district court dismissed Patchak's complaint on the theory that Patchak lacked prudential standing because he was not within the IRA's zone of

interests. DOI Pet. App. 37a. The district court concluded Patchak fell outside that zone because he was "not an Indian" and did not "seek to protect or vindicate the interests of any Indians or Indian tribes." *Id.* at 35a. The district court stated that "because the Court finds that plaintiff lacks prudential standing, the Court need not, and does not, reach [the Quiet Title Act] issue in this opinion." *Id.* at 37a n.12.

9. The D.C. Circuit reversed. *Id.* at 22a. As an initial matter, the D.C. Circuit noted that "[t]here is no doubt that Patchak satisfied the standing requirements derived from Article III of the Constitution" and that "[n]either the Secretary nor the Band argues otherwise." *Id.* at 4a. Emphasizing this Court's guidance concerning the APA's "'generous review provisions,'" *id.* at 5a, the court of appeals recognized that Patchak falls within the IRA's zone of interests. "The IRA provisions interpreted in [*Carcieri*] limit the Secretary's trust authority." *Id.* at 7a. "When that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected." *Id.* The court noted that "[t]he Interior Department itself recognizes the interests of individuals like Patchak who live close to proposed Indian gaming establishments": DOI regulations allow "'affected members of the public' thirty days to seek judicial review before the Secretary takes land into trust for an Indian tribe," and "[o]ther regulations require the Secretary to consider the purpose for which the land will be used and whether taking a tribe's land into trust would give rise to 'potential conflicts of land use.'" *Id.* at 8a–9a (citing 25 C.F.R. §§151.12(b) &

151.10(c), (f)). The D.C. Circuit also observed that "[t]he zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 10a (quoting *Clarke* v. *Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). Unlike that type of marginal litigant, Patchak's "stake in opposing the Band's casino is intense and obvious," and it would be "very strange to deny Patchak standing in this case." *Id.*

The D.C. Circuit also rejected the government's assertion that Patchak's APA claim was barred by the Indian-lands exception to the Quiet Title Act's sovereign-immunity waiver. *Id.* at 21a. The court of appeals noted that the "common feature of quiet title actions is missing from this case": Patchak is not trying to "'establish a plaintiff's title to land,'" as "he mounts no claim of ownership of the Bradley Tract." *Id.* at 14a. The court observed that "the language of §2409a firmly indicates that Congress intended to enact legislation building upon the traditional concept of an action to quiet title." *Id.* at 14a–15a. Section 2409a of the QTA requires the plaintiff to "'set forth with particularity the nature of *the right, title, or interest which the plaintiff claims in the real property*.'" *Id.* at 15a (emphasis added) (quoting 28 U.S.C. §2409a(d)). Further, §2409a(b) allows the government the option of retaining possession of the land if it loses the quiet title action, "so long as the government pays just compensation to the person entitled to the property." *Id.* at 16a. This just-compensation provision "is senseless unless there is someone else—the plaintiff—claiming ownership." *Id.* Accordingly, the D.C. Circuit declined to follow

other courts that have "extended the reach of the Quiet Title Act beyond its text," instead holding that "the terms of the Quiet Title Act do not cover Patchak's suit" and that "[h]is action therefore falls within the general waiver of sovereign immunity set forth in §702 of the APA." *Id.* at 21a.

Because the court of appeals determined that the QTA did not apply, it chose not to address Patchak's argument that because he filed suit before the Bradley Tract was taken into trust, even if the QTA applied, sovereign immunity did not bar his claim. *Id.* at 21a n.10.

10. Soon after the court of appeals issued its decision permitting Patchak's APA challenge to proceed, the Band opened its sprawling casino complex. As Patchak predicted, the casino has severely disrupted his community's rural character. Media reports indicated that after opening, the parking lots at the casino were "so full and traffic is so heavy along US 131 [that police] closed the northbound and southbound exits" to the highway. Appellant's COA Resp. to Band's Mot. to Stay the Mandate, Ex. A.

Police calls in the area have, as expected, "skyrocketed," doubling from historical levels in the first month of operations and tripling in the second month. Grand Rapids Press article, Apr. 9, 2011, *available at* http://www.mlive.com/news/grandrapids/index.ssf/2011/04/why_township_officials_arent_c.html. One local sheriff described the casino's opening as "like dropping a small city into the middle of that area." *Id.*

In short, the casino complex has already disrupted the rural lifestyle of Wayland Township.

SUMMARY OF ARGUMENT

1. Patchak's claim is a paradigmatic APA claim: he challenges a final decision by a federal agency, the DOI, because that decision violates federal law, the IRA. Congress waived sovereign immunity in the APA for situations precisely like this one, to allow citizens to hold federal officials and agencies accountable for violating the law.

The DOI attempts to shield its action from judicial review by relying on the Quiet Title Act's sovereign-immunity provisions. But Patchak is not bringing a QTA claim. As the government recognizes, he could not bring one because he is not asserting that he has any right, title, or interest in the property.

Moreover, the QTA does not preclude Patchak from bringing his claim under the APA. The QTA's preclusive scope extends only to claims that the QTA recognizes in the first place. There is nothing in the QTA's text to indicate that it precludes claims brought under other statutes by parties that are not alleging an interest in the subject property. Indeed, if the QTA precluded claims like Patchak's, then such claims of unlawful agency action would receive no meaningful judicial review, contrary to the strong presumption established by this Court and the Congress.

Because Patchak is not bringing a quiet-title action and because the QTA does not preclude his bringing an APA claim, the QTA's sovereign-immunity provisions do not apply, any more than sovereign-immunity provisions found in some other federal statute (such as the Tucker Act) would apply. And because the QTA's sovereign-immunity provisions do not apply to a claim based on a completely different theory (i.e., an APA claim), it makes no

sense to think the QTA implicitly forbids a particular type of relief on that claim. Moreover, the relief Patchak seeks differs fundamentally from quiet-title relief: Patchak seeks reversal of the DOI's unauthorized action, not a declaration of who has title to the Bradley Tract.

2. Patchak also satisfies the zone-of-interests test for prudential standing. This test, which this Court has said is "not meant to be especially demanding," is satisfied because the interests Patchak seeks to protect are "arguably within the zone of interests to be protected or regulated" by §465 of the IRA. This Court has recognized that a statute's zone of interests includes those parties that Congress could have relied upon to challenge agency disregard of the law. Patchak is doing exactly that by enforcing the limitation of §465 that this Court recognized in *Carcieri*: that the DOI can take land into trust only for those who qualify as an Indian tribe under the IRA. Further, §465 directly implicates land-use concerns because its purpose of providing land to Indians is to promote economic self-sufficiency through *use* of trust land.

The DOI's own regulations adopted under §465 demonstrate the DOI's acknowledgment that land use is a concern within the IRA's zone of interests. Those regulations expressly require the DOI to consider proposed land uses when making land-in-trust decisions—specifically, to consider both "[t]he purposes for which the land will be used" and "potential conflicts of land use which may arise." 25 C.F.R. §151.10(c) & (f). In fact, these regulations are controlling under *Chevron* because they fill a gap Congress left in the IRA when Congress did not identify what considerations should govern the DOI's discre-

tion to take land into trust. If courts are required to give the regulations controlling weight regarding the statute's meaning, then logically those regulations provide guidance about the statute's zone of interests—particularly where, as here, the statutory text provides so little guidance. In short, like the state and local governments that even petitioners concede have prudential standing, Patchak falls within §465's zone of interests because he seeks to enforce the limit §465 imposes on whether land can be taken into trust.

Patchak's concerns also fall within the IRA's zone of interests upon proper consideration of the integrally related IGRA. *Clarke*, 479 U.S. at 396, 399. In *Clarke*, this Court looked to provisions enacted in two separate statutes when applying the zone-of-interests test because one statute was a specific limitation on the other. Here, the IGRA, in 25 U.S.C. §2719, specifically limits the DOI's authority to take land into trust for an Indian tribe under §465 when the land will be used for gaming. Because this Court considers integrally related statutes when determining the arguable zone of interests and because the petitioners agree that Patchak's interests fall with the IGRA's zone of interests, Patchak's asserted interests also fall within the IRA's zone of interests.

ARGUMENT

I. The Quiet Title Act's sovereign-immunity provisions do not apply to Patchak's APA suit

A. Patchak's challenge to unlawful agency action falls squarely within the APA's waiver of federal sovereign immunity

As this Court has long recognized, the Administrative Procedure Act "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. §702), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99, (1977). Congress made this presumption of judicial review even clearer in 1976 when it amended §702 to expressly waive sovereign immunity. The amendment provided that a suit under §702 "shall not be dismissed nor relief therein be denied on the ground that it is against the United States" and allowed "a judgment or decree may be entered against the United States." 5 U.S.C. §702. Thus, "[w]e begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

By waiving sovereign immunity to allow challenges to unlawful agency actions, Congress recognized a central maxim of American government: no one, not even the government, is above the law. See H.R. Rep. No. 94-1656, at 10 (1976) ("Only if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under law."); *id.* at 7 ("'the funda-

mental concept of the APA [is] that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness'"). This Court has long recognized this principle:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right . . . between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States. [*Bowen*, 476 U.S. at 670 (quoting *United States* v. *Nourse*, 34 U.S. 8, 28–29 (1835)).]

"Both Houses of Congress have endorsed this view" in their comments during the APA's passage. See *id.* at 671.

Patchak's claim falls squarely within §702's scope. His complaint focuses on illegal agency action, alleging that the DOI "unlawfully approved placing into trust approximately 146 acres of land," that agencies "have no authority to place the Property into trust for the Gun Lake Band because the [IRA] only permits land to be taken into trust for Indian tribes that were federally recognized as of June 1934," and that the agency decision was therefore "unlawful and *ultra vires*." J.A. 30, 31–32; see also J.A. 37 ("Defendants' approval of the trust acquisition violates §§5 and 19 of the [IRA] . . . and is *ultra vires*.").

The relief Patchak seeks under the APA also properly focuses on reversing the unauthorized

agency decision. His complaint asks the court to "find the action of Defendants unlawful and [to] reverse the decision to take the Property in trust for the Gun Lake Band," to "issue a declaratory judgment declaring that Defendants' decision to take the Property into trust violates" the IRA, and to enjoin transferring the land into trust for the Band. J.A. 39. In short, Patchak is asserting an APA claim directed at reversing unlawful agency action.

Petitioners do not deny that Patchak is challenging an agency action as unlawful. Instead, they contend that the APA's sovereign-immunity waiver does not apply here because §702 states that "[n]othing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. §702. But the QTA does not grant consent to suit to individuals situated like Patchak, nor does it expressly or impliedly forbid the relief he seeks.

B. Patchak's claim cannot be brought under the Quiet Title Act

The QTA's plain language demonstrates that Patchak is not bringing a quiet-title action because he is not asserting any right, title, or interest in the land. As the court of appeals recognized, because Patchak's claim does not fall within the QTA's scope, the Act, including its sovereign-immunity provisions, does not apply to his suit. DOI Pet. App. 19a. Simply put, the QTA does not provide "consent to suit," 5 U.S.C. §702, to people bringing a claim like Patchak's, and thus the APA sovereign-immunity waiver governs his claim.

The QTA's text shows that the Act governs only traditional quiet-title actions, i.e., actions where the

plaintiff claims some interest in the property at issue. Section 2409a(d) requires the complaint to "set forth with particularity the *nature of the right, title, or interest which the plaintiff claims in the real property*." 28 U.S.C. §2409a(d) (emphasis added). This language expressly limits the QTA's scope to quiet-title actions. The government correctly recognizes this. DOI Br. 16–17 ("[T]he QTA permits challenges to the United States' claim of title to real property to be brought *only* by parties who themselves claim an interest in the same property." (emphasis added)). The Band, in contrast, states that it is "unclear" whether "the QTA authorizes suit only by plaintiffs asserting their own title to property." Band Br. 13. The Band, relying on the phrase "'to adjudicate *a* disputed title'" in §2409a(a), theorizes that the plaintiff does not have to claim title in himself. Band Br. 28; see also *id.* at 30 n.10 (suggesting that the QTA "would presumably encompass situations where the plaintiff asserts legal injury arising from the fact that title should be quieted *in a third party*" (emphasis added)). But the Band's theory conflicts with §2409a(d)'s requirement that the complaint identify "with particularity the nature of the right, title, or interest *which the plaintiff claims* in the real property." 28 U.S.C. §2409a(d) (emphasis added).

The QTA's jurisdictional and venue provisions reinforce that limitation. The QTA confers jurisdiction on the federal courts solely for quiet-title actions: "[t]he district courts shall have exclusive original jurisdiction of *civil actions under section 2409a to quiet title* to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. §1346(f) (emphasis added). The QTA's venue provision uses the same language: "Any *civil action under section 2409a to quiet title* to

an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court . . . ." 28 U.S.C. §1402(d) (emphasis added). Congress adopted these provisions contemporaneously with §2409a, demonstrating that the scope of §2409a covers only quiet-title actions; in other words, Congress intended the phrase "a civil action under this section to adjudicate a disputed title to real property," 28 U.S.C. §2409a(a), to mean the same thing as a "civil action under 2409a to quiet title to an estate or interest in real property," 28 U.S.C. §1346(f). See also DOI Br. 21 (citing legislative history showing that there is no substantive difference between the phrase "suits to adjudicate disputed titles to land" and the phrase "suits to adjudicate certain real property quiet title actions"). Accordingly, this Court recognized, shortly after the QTA was enacted, that §2409a applies to suits "to quiet title to land." *California* v. *Arizona*, 440 U.S. 59, 65 (1979).

Further, §2409a(b) provides that if an action under this section results in a determination adverse to the United States, it may elect to "retain [its] possession or control of the real property" if it makes "payment to the person determined to be entitled" to the land and pays that person "just compensation for such possession or control." As the D.C. Circuit pointed out, this "provision is senseless unless there is someone else—the plaintiff—claiming ownership." DOI Pet. App. 16a.

Ever since the QTA's enactment, the government has taken these provisions at face value and agreed that the QTA does not apply to suits where the plaintiff does not assert a claim to the title of the land in question. For example, in *Tudor* v. *Members of Ar-*

kansas State Parks, Recreation & Travel Commission, 83 F.R.D. 165 (E.D. Ark. 1979), the government "forcefully argued that the jurisdictional basis of these lawsuits, 28 U.S.C.A. §2409a, was never intended to provide a federal forum to plaintiffs who have no title, color of title or possessory interest in land in which the United States claims an interest." *Id.* at 168 (footnote omitted). The district court agreed and accordingly dismissed the case for a lack of standing. *Id.* at 173. The government has for decades successfully asserted a lack of jurisdiction or failure to state a claim to deflect QTA claims where the plaintiff does not assert title in herself.[1] See, e.g., *Kinscherff* v. *United States*, 586 F.2d 159, 161 (10th Cir. 1978); *Alleman* v. *United States*, 372 F. Supp. 2d 1212, 1222 (D. Or. 2005); *Friends of Panamint Valley* v. *Kempthorne*, 499 F. Supp. 2d 1165, 1175, 1177 (E.D. Cal. 2007).

Consistent with the statutory text and the government's position, this Court has applied the QTA only to plaintiffs seeking title in themselves. In *Block* v. *North Dakota*, 461 U.S. 273 (1983), "the United States and North Dakota assert[ed] competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota." *Id.* at 277. Because North Dakota brought a suit asserting that it had title to the land and that the United States did not—a traditional quiet-title suit—this Court refused to allow North Dakota to use "artful

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[1] The Band also argues that, by 1972, some states had expanded quiet-title actions to allow those not in possession to sue, Band Br. 29, but regardless of whether state quiet-title actions required the plaintiff to have possession, state laws (and the QTA) require an interest in the subject property.

pleading" to avoid the Act's limitations. *Id.* at 284. Consistent with this context, the Court's holding in *Block* is specifically limited to plaintiffs asserting title to the land in dispute: "We hold that Congress intended the QTA to provide the exclusive means by which *adverse claimants* could challenge the United States' title to real property." *Id.* at 286 (emphasis added).

Similarly, *United States* v. *Mottaz*, 476 U.S. 834 (1986), also involved a traditional quiet-title action by an adverse claimant seeking title to the land, *id.* at 841, 846, 849, and thus involved a claim that fell within the QTA's scope. While the Band asserts that "[t]he nature of the plaintiff's interest . . . played no part in this Court's analysis" in *Mottaz*, Band Br. 27, the Court emphasized the nature of the plaintiff's interest, highlighting that the plaintiff asserted title to the lands in dispute: "What respondent seeks is a declaration that she alone possesses valid title to her interests in [certain parcels of land] and that the title asserted by the United States is defective." *Id.* at 842; see also *id.* at 841, 846, 849 (repeatedly referring to "adverse claimants").

C. The Quiet Title Act does not preclude Patchak's APA claim

Notwithstanding that Patchak did not (and could not) bring a QTA claim, the government seems to argue that his claim must be brought as a QTA claim. In other words, the government contends that the QTA precludes the field to such an extent that it forbids relief even to those who have no QTA claim in the first place. This approach is untenable for several reasons.

First, nothing in the QTA's text suggests that the QTA precludes the claims of parties that are not alleging an interest in the subject property. As this Court has frequently recognized, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Verizon Md., Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 643 (2002) (quoting *Abbott Labs.*, 387 U.S. at 141). Simply put, the reviewability of quiet-title claims under the QTA does not create a presumption that the QTA precludes claims involving federal lands for which the plaintiff is not seeking to quiet title.

Block is not to the contrary. The DOI relies on *Block* for the proposition that a plaintiff cannot circumvent the QTA's detailed remedial scheme by artful pleading. DOI Br. 15. But the plaintiff in *Block* was seeking to enforce an adverse claim to property, a quintessential quiet-title claim. In contrast, Patchak is not using artful pleading to characterize an adverse claim to the Bradley Tract as something else because he has no such claim. Rather, he is bringing a different type of claim entirely (an APA claim) based on a completely different legal theory (that the agency violated the IRA when it took the land into trust). Although the Band contends that *Block* shows that whether the QTA's provisions apply does "not depend on the nature of the plaintiff's cause of action," Band Br. 28, *Block* teaches the opposite: the QTA applied to North Dakota's claim because it was a quiet-title claim. 461 U.S. at 284. The Court concluded that the QTA impliedly forbade relief under §702 because North Dakota brought the particular type of claim that the QTA addresses. *Id.* at 286 n.22.

As petitioners correctly identify, the QTA is a precisely drawn statute with specific limitations. DOI Br. 13; Band Br. 23. This observation does not help them. To the contrary, it further demonstrates that the QTA does not apply to an APA claim. A precisely drawn statute governs over more general remedies only when the claim asserted is the sort of claim that falls within the scope of that precisely drawn statute. Because Patchak's claim is an APA claim, not a QTA claim, the APA is the relevant precisely drawn statute governing his claim.

The cases petitioners rely on illustrate this point. DOI Br. 13–14; Band Br. 23–24. In *Brown* v. *GSA*, 425 U.S. 820 (1976), for example, this Court addressed "whether §717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy *for claims of discrimination in federal employment*." *Id.* at 821. This Court explained that Congress created a particular scheme to address a specific type of claim: "congressional intent . . . was to [create] an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829. But nothing in *Brown* indicates that a precise scheme governing discrimination claims would limit claims unrelated to discrimination. Similarly, in *Hinck* v. *United States*, 550 U.S. 501 (2007), this Court recognized that a tax statute specifically authorized suits to abate taxes and that the statute therefore provided the exclusive avenue for suits within the tax statute's scope. *Id.* at 506–07.

Here, Patchak is not bringing a suit within the QTA's scope, which means the QTA is not, as the Band would have it, the "'better fitted statute.'" Band Br. 33. Although "Congress intended the QTA to provide the exclusive means by which *adverse*

claimants could challenge the United States' title to real property," *Block*, 461 U.S. at 286 (emphasis added), there is nothing to indicate that Congress intended the QTA to be the exclusive avenue by which aggrieved persons could challenge unlawful agency actions involving federal lands. Instead, Congress passed a separate statute, the APA, that governs such claims. The Quiet Title Act *is* precisely drawn, but the consequence of that precision is that the aptly named Quiet Title Act applies only to quiet-title actions, not to APA claims.

Second, if the Court were to adopt the approach urged by the government, then there would be no judicial review for many types of claims challenging agency action. Specifically, because the QTA requires the plaintiff to have an interest in the property at issue, and the government believes that any claim affecting the government's title to property must be brought as a QTA claim, parties without an interest in the property could never bring *any* claim that affects the government's title to property. The government presents no justification for this extreme result. Indeed, it runs contrary to the well-established principle that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen*, 476 U.S. at 670 (quotation omitted). Accordingly, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 672 (quoting *Abbott Labs.*, 387 U.S. at 141); *see also id.* (noting the "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [an agency's] decision" (internal quotation marks omitted)). There is no indication, let alone

"clear and convincing evidence," in the QTA that Congress intended to preclude such a large group of claims from any judicial review.

D. The Quiet Title Act's sovereign-immunity provisions do not apply to Patchak's APA claim

Because Patchak can and did bring his claim as an APA claim and not a QTA claim, the QTA's sovereign-immunity provisions simply do not apply to his APA claim. As the APA states, the only sovereign-immunity provision that matters is one in a statute that grants "consent to suit." The QTA does not grant consent to individuals like Patchak who are not bringing quiet-title claims.

Indeed, it is illogical to suggest that the QTA's sovereign-immunity provisions apply to a non-QTA claim. If Patchak's claim does not fit within the QTA's scope, then it does not fall within the co-extensive scope of the QTA's waiver, and therefore it cannot fall within the scope of the exception to that waiver (because an exception to a waiver cannot exceed the scope of the waiver itself). Put another way, the QTA waives the United States' sovereign immunity only for suits brought by adverse claimants asserting title to federal lands, and the Indian-lands exception merely provides sovereign immunity from quiet-title actions related to that subset of federal lands.

1. The petitioners contend that because the QTA was adopted against a background that assumed the existence of sovereign immunity, the Indian-lands exception must apply to all suits involving Indian lands, regardless of whether the suits fit within the QTA's scope. DOI Br. 17, 21–22; Band Br. 24–25.

But the Indian-lands exception is not a free-standing assertion of sovereign immunity; it is part of the QTA and must be read in that context.

The QTA's sovereign-immunity provision expressly states that "*[t]his section* does not apply to trust or restricted Indian lands." 28 U.S.C. §2409a(a) (emphasis added). Thus, the Indian-lands exception applies only to the section governing QTA claims, not to all claims affecting Indian lands. Moreover, relying on a background rule makes sense for those statutes that do not address sovereign immunity, but the QTA *does* address sovereign immunity and therefore supplants that background rule. As then-Assistant Attorney General Scalia explained in his letter concerning the 1976 amendment to §702, "[b]ecause existing statutes have been enacted against the backdrop of sovereign immunity, this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive." S. Rep. No. 94-996, at 27. In other words, if a statute enacted before 1976 authorized certain remedies against the government but not other remedies, then it makes sense to assume that the statute waived sovereign immunity only for the enumerated remedies. But Congress specifically addressed sovereign immunity in the QTA, waiving sovereign immunity for all quiet-title claims concerning federal land except for the subset of federal lands held in trust for Indians. The QTA's provisions (including its sovereign-immunity provisions) are specifically tailored to quiet-title actions and cannot extend beyond the Act's scope.

Petitioners argue that the purpose of the Indian-lands exception will be thwarted if suits such as Patchak's are allowed to proceed. They stress the

need for stability for Indian trust lands. But they ignore a key fact in this case: Patchak brought his APA suit *before* the government took the land into trust.[2] Rather than allowing Patchak's suit to resolve whether the DOI could lawfully take the land into trust based on the then-pending decision in *Carcieri*, the DOI took the land into trust (and the Band began developing the casino complex) with the goal of avoiding judicial review. Any instability and uncertainty regarding the Band's investments in the land are of the DOI's own making, resulting from its decision to forge ahead with its unlawful decision.

2. Even though Patchak's claim does not fall within the QTA's scope, the petitioners argue that his claim is "impliedly" prohibited by the QTA and therefore precluded by the last clause of §702—"Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. §702. But the relief Patchak seeks—a reversal of the DOI's land-in-trust decision, a declaratory judgment that the agency decision violated the IRA, and an injunction preventing the government from violating that statute by taking the

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[2] When Patchak filed his complaint, the land had not been taken into trust and therefore the QTA's sovereign-immunity provisions could not have applied. Patchak Opp'n 20. Because "[i]t has long been the case that 'the jurisdiction of the court depends upon the state of things at the time the action was brought,'" *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004), the existence of a waiver of sovereign immunity when the complaint was filed should prevent the executive branch from manipulating jurisdiction by asserting sovereign immunity after the complaint's filing.

land into trust—is not impliedly forbidden by the QTA.

Petitioners argue nonetheless that the relief Patchak seeks is forbidden because it would divest the government of title. DOI Br. 9, 11, 19–20; Band Br. 12. But even assuming that the relief sought could be separated from the cause of action authorizing it (it cannot), the fact that a declaration stating that the DOI acted without authority would end the land's trust status does not mean the declaration would be quiet-title relief. If Patchak prevails, he will obtain a ruling that the DOI exceeded its authority by taking land into trust for the Band because the Band was not under federal jurisdiction in 1934. In contrast, a plaintiff successfully asserting an adverse ownership interest under the QTA will obtain a declaration of title that the plaintiff has an interest in the property and will receive either possession of the property or payment for that interest.

Furthermore, as discussed above, the QTA provides no "consent to suit" for Patchak's claim. As the Seventh Circuit recently explained, if a given statute "could never apply to the type of claim advanced, then there is no reason to think that it implicitly forbids a particular type of relief for a claim outside its scope." *Michigan* v. *U.S. Army Corps of Eng'rs*, 667 F.3d 765, 776 (7th Cir. 2011), cert. denied, 2012 WL 603147 (2012). Here, the QTA focuses solely on quiet-title actions and says nothing to forbid implicitly APA claims directed at unlawful agency action.

Block recognized that §702 implicitly bars a claim "'when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy'" for that type of claim. 461 U.S. at 286 n.22. In other words, when interpreting

§702's phrase "expressly or impliedly bars relief," this Court understood that determining whether a statute impliedly bars relief necessarily requires considering whether the statute addresses the particular type of claim being brought. Because North Dakota was bringing a quiet-title claim, the QTA did deal in particularity with the type of claim at issue and therefore §702 implicitly barred other relief.

The legislative history confirms that the limitations on specific relief were tied to statutes addressing specific type of claims. For example, the Tucker Act "created a damage remedy for contract claims" against the government, and by authorizing a damage remedy for contract claims Congress "intended to foreclose specific performance of government contracts." S. Rep. No. 94-996, at 12 (1976); 121 Cong. Rec. S16576 (daily ed. Sept. 24, 1975). Given that the Tucker Act impliedly forbids specific performance of a government contract, the "impliedly forbids" clause meant that someone could not bring a contract claim under the APA to seek specific performance.

The legislative history emphasized that the limitations on specific relief were tied to statutes addressing specific types of claims. Then-Assistant Attorney General Scalia's letter reinforces the point: "[W]hen [Congress's] action is not addressed to *the type of grievance which the plaintiff seeks to assert*, suit would be allowed." *Id.* at 27 (emphasis added). And so does language from the legislative history quoted by the Band: the last clause in §702 applies when "Congress has consented to suit and the remedy provided is intended to be the exclusive remedy . . . *with respect to a particular subject matter*." *Id.* at 11–12 (emphasis added); see also Band Br. 35. In short, courts are to examine the other statute to de-

termine whether it expressly or impliedly forbids a particular type of relief, and in doing so, the courts must take into account the type of claim the statute addresses. Because the QTA is not addressed to grievances based on unauthorized agency action, Patchak's suit should be allowed.

3. In applying §702's last clause, this Court and the federal circuit courts have consistently recognized that both the source of the right and the type of relief sought must be considered when determining whether the "other statute" implicitly forbids the relief sought. Specifically, in *Mottaz*, the Court focused on the essence of the plaintiff's case, not just the relief sought, when considering whether the plaintiff's claim fell under the Tucker Act or the QTA. 476 U.S. at 848. The Court noted that "the case she made, and the relief she seeks, do not fit within the scope of the Tucker Act." *Id.* Even though she sought money damages (which the Tucker Act does authorize), the relief she sought was not Tucker Act relief: "A Tucker Act-based lands suit would seek damages equal to just compensation for an already completed taking of the claimant's land," which amounted to "whatever compensation she was allegedly denied in 1954," *id.* at 850–51, but she instead sought damages "equal to the current fair market value" of the land in 1986, *id.* at 839 (emphasis added). In other words, even though the relief she sought bore some similarities to relief available under the Tucker Act, this Court recognized that it was not Tucker Act relief because Tucker Act relief focuses on "damages for the Government's past acts," whereas QTA relief focused on just compensation at the time the adverse claimant is held to have superior title and to "be entitled" to ownership of the land. 28 U.S.C. §2409a(b).

Unlike the plaintiff in *Mottaz*, the "essence and bottom line of [Patchak's] case" is not a claim for title. 476 U.S. at 842. Quite the opposite—the essence of Patchak's claim is that the DOI violated the IRA and that its decision should be declared unlawful and reversed. Just as this Court explained that monetary relief is not Tucker Act relief when it is not calculated under the theory of a Tucker Act claim, so too declaratory relief under the APA is not QTA relief because it rests on a completely different theory: that the agency violated federal law by taking the land into trust, not that Patchak is entitled to title to the land.

Similarly, in *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959 (D.C. Cir. 1982), the D.C. Circuit examined whether the Tucker Act's sovereign-immunity waiver applied to a Trade Secrets Act claim relating to various contracts. *Id.* at 964. If the Tucker Act had applied, then sovereign immunity would be waived only for suits brought in the Court of Claims and the district court would have lacked jurisdiction. *Id.* at 963. The D.C. Circuit explained that "[t]he classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate)." *Id.* at 968. The court concluded that the plaintiff's claims were "not 'disguised' contract claims" because the plaintiff "[did] not claim a breach of contract," focused on relief appropriate for protecting its trade secrets, and sought "no monetary damages." *Id.* at 969. Accord *Sharp* v. *Weinberger*, 798 F.2d 1521, 1522–25 (1986) (when determining whether "the Tucker Act and the Little Tucker Act impliedly forbid relief" for the particular claims, the

court divided the claims based on the source of the rights and the relief sought).

Other circuit courts have also recognized that the source of the right and the type of claim being brought matter to whether the other statute impliedly forbids the relief sought. See, e.g., *Up State Fed. Credit Union* v. *Walker*, 198 F.3d 372, 375 (2d Cir. 1999) (adopting the *Megapulse* framework); *United States* v. *J & E Salvage Co.*, 55 F.3d 985, 988–89 (4th Cir. 1995); *B & B Trucking, Inc.* v. *U.S. Postal Serv.*, 406 F.3d 766, 768 (6th Cir. 2005) (en banc) (quoting *Megapulse*); *Evers* v. *Astrue*, 536 F.3d 651, 657 (7th Cir. 2008) (following *Megapulse*); *Tucson Airport Auth.* v. *Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998); *Normandy Apts., Ltd.* v. *U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1300 (10th Cir. 2009) (citing *Megapulse* and *Sharp* and considering whether the claim was "'at its essence' a contract claim"); *Begner* v. *United States*, 428 F.3d 998, 1002 (11th Cir. 2005) (adopting *Megapulse*); *Nebraska Pub. Power Dist.* v. *United States*, 590 F.3d 1357 (Fed. Cir. 2010) (citing *Sharp* with approval).

The Seventh Circuit recently applied the same reasoning in the context of the Federal Tort Claims Act, explaining that there is no reason to apply a statute's sovereign-immunity provisions outside the statute's scope. In *Michigan*, several Great Lakes states sought an injunction against the Army Corps of Engineers on the theory that allowing an invasive fish species to enter Lake Michigan would violate the federal common law of public nuisance and advanced a related claim against the Corps under §702. 667 F.3d at 768. In response, the Corps argued that it was entitled to sovereign immunity under the FTCA,

because the FTCA does not waive sovereign immunity for suits "that seek declaratory and injunctive relief based on a federal common-law tort." *Id.* at 774. The Corps, relying on the phrase "expressly or impliedly forbids relief" in §702, made the same type of argument that the DOI makes here. *Id.* at 775 ("[W]hen Congress enacted the FTCA in 1946, it did so against a backdrop of no tort liability for the United States; the FTCA waives the government's sovereign immunity in suits for money damages to the extent that a private person would be held liable under applicable state tort law; but while the FTCA authorizes actions for damages, it says nothing at all about injunctive relief; thus, the FTCA implicitly prohibits injunctive relief in tort suits against the United States; and because of §702(2), the Corps's argument concludes, the plaintiffs cannot use the APA's waiver of immunity to assert a common-law tort claim against the United States." (citations omitted)).

The Seventh Circuit rejected this argument, recognizing that it "reads too much into congressional silence." *Id.* First, "[t]here is nothing in the statute suggesting that Congress meant to forbid all actions that were not expressly authorized." *Id.* "To the contrary, section 702(2) requires evidence, in the form of either express language or fair implication, that Congress meant to forbid the relief that is sought." *Id.* "The Corps's effort," the Seventh Circuit continued, "to transform silence into implicit prohibition would seriously undermine Congress's effort in the APA to authorize specific relief against the United States." *Id.* Second, the Seventh Circuit noted that "state tort law—not federal law—is the source of substantive liability under the FTCA," which meant that the States' tort claim based solely on federal

common law "would not be cognizable under the FTCA in the first place." *Id.* at 776. The Seventh Circuit reasoned that "if the FTCA could never apply to the type of claim advanced, then there is no reason to think that it implicitly forbids a particular type of relief for a claim outside its scope." *Id.* The same is true here.

The reasoning of these cases including *Block* and *Mottaz* is directly on point here. The essence of Patchak's claim is a challenge to unauthorized agency action; it is not a quiet-title action. This is evident from the source of law which he relies (the APA, not the QTA), from the relief he seeks (a declaration that the DOI violated federal law), and from the relief he does not seek (any declaration that he holds title to the property). He is not bringing a disguised quiet-title claim; if he were, it would be singularly ineffectual, as he never asks for title to the land. And because his claim could never be brought under the QTA, there is no reason to think the QTA implicitly forbids relief for his claim. Consequently, the D.C. Circuit did not err by focusing on the relief Patchak did not seek. Contra DOI Br. 19.

In contrast, the three decisions by the courts of appeals that have held that the QTA's sovereign-immunity provisions do bar APA suits ignored both the type of claim the plaintiff was bringing and the QTA's plain language. In *Florida Department of Business Regulation* v. *Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), the Eleventh Circuit never addressed §2409a(d)'s requirement that the plaintiff claim "right, title, or interest . . . in the real property," and even admitted that "technically the suit in the instant case [was] not one to quiet title." *Id.* at 1254. The Ninth Circuit's decision in *Metro-*

politan Water District of Southern California v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court sub. nom. *California* v. *United States*, 490 U.S. 920 (1989), also ignored §2409a(d)'s statutory requirement that the plaintiff be an adverse claimant. And although the Tenth Circuit at least mentioned the pleading requirements of §2409a(d) in *Neighbors for Rational Development* v. *Norton*, 379 F.3d 956, 962 (10th Cir. 2004), it mentioned them only to say that "plaintiffs cannot circumvent the intent of the Quiet Title Act's limitations with artful pleading." *Id.* at 965. But ignoring the QTA's requirement that the plaintiff assert an interest in the property to state a quiet-title claim, as the Tenth Circuit did, is not the way to effectuate the QTA's limitations.

4. The rights-and-remedies approach, demonstrated in *Mottaz*, in circuit-court cases addressing the Tucker Act, and in *Michigan*, makes sense. If courts are not required to factor in the type of claim the plaintiff is bringing, then the government could turn to any statute that includes both a waiver of sovereign immunity and an exception to the waiver and rely on that exception, regardless of the fact that the statute has nothing to do with the type of claim the plaintiff is bringing.

For example, the Federal Tort Claims Act has nothing to do with Patchak's claim, yet under the government's approach, the FTCA's discretionary-function exception would apply to this case. The FTCA waives sovereign immunity to allow tort claims against the United States. *United States* v. *Olson*, 546 U.S. 43, 44 (2005). The FTCA includes an exception to the waiver for "[a]ny claim . . . based upon the exercise . . . [of] a discretionary function or

duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused." 28 U.S.C. §2680(a). The natural reading of this exception would limit it to tort claims. But under the government's approach, which untethers sovereign-immunity provisions in statutes from the types of claims the statutes cover, this exception could also bar Patchak's claim, because Patchak challenges the DOI's discretionary decision to take land into trust. See 25 U.S.C. §465 ("The [Secretary] is authorized, *in his discretion*, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." (emphasis added)). Indeed, the government's argument suggests that it would be anomalous to allow persons like Patchak, who could not bring a valid tort claim against the government, to challenge such a discretionary decision when even a person with a valid tort claim could not challenge the decision. The fact that the government's theory could be applied with such little regard for the scope of the "other statute" demonstrates how flawed that theory is.

As just noted, petitioners argue that it would be anomalous to allow persons who could not bring a valid quiet-title claim against the government to challenge a land-in-trust decision when even a person with an interest in the property could not. E.g., DOI Br. 9; Band Br. 13. They essentially argue that adverse claimants have a greater interest than Patchak because adverse claimants have an interest in the land, and so it would be perverse to allow him, with his lesser interest (i.e., no interest in the land), to sue. E.g., Band Br. 29. This argument misses the point. Patchak's interest in suing an agency for a violation of federal law that injured him is not a *lesser* interest, it is a *different* interest. True,

Patchak has no interest in the land, but that merely confirms that the QTA does not apply in the first place. Yet he has a strong interest in holding a federal agency accountable for taking unlawful action that injured him, and, contrary to the Band's characterization of this as a "second-hand interest," Band Br. 37, it is precisely the sort of interest Congress enacted the APA to protect. Simply put, an interest in preventing the increased noise, traffic, and crime that the casino complex would bring (and has already brought) is not a "lesser" interest than an interest in the land itself

5. Petitioners and amici postulate that, notwithstanding the QTA's and the APA's text, policy considerations require ignoring that text and providing the DOI with "full immunity" from suits regarding Indian trust lands. Specifically, they argue that the limited QTA Indian-lands exception must be considered in the context of the role trust lands play in promoting tribal economic development and of the uncertainty that allowing APA claims like Patchak's will create. E.g., Band Br. 26. But the statutes' plain language, as discussed above, does not allow for such considerations. *Carcieri*, 129 S. Ct. at 1066–67 ("We need not consider these competing policy views, because . . . 'courts must presume that a legislature says in a statute what it means and means in a statute what it says'."). Further, petitioners and the amici exaggerate the supposed effects of affirming the QTA ruling. The APA's six-year statute of limitations, 28 U.S.C. §2401(a), which runs from the land-in-trust decision, still applies. And the APA allows the DOI to raise a fully array of defenses—such as laches and standing—that will protect against uncertainty. 5 U.S.C. §702 (courts retain the authority to dismiss any action "on any other appropriate legal

or equitable ground"); COA J.A. 41–42 (answer asserting defenses).) Further, uncertainty will arise only if there is good reason to think the agency's land-in-trust decision was unlawful, and in that event a plaintiff with standing should be allowed to advance an APA claim, just like any other APA plaintiff. Finally, even if the land-in-trust decision is held to be unlawful, the land will revert to the ownership of the affected tribe to use as any other landowner could.

E. Petitioners' application of the Quiet Title Act allows judicial review of land-in-trust decisions only at the pleasure of the DOI

The practical effect of petitioners' application of the QTA's sovereign-immunity provisions is that the DOI gets to unilaterally decide whether its land-in-trust decisions are subject to judicial review. The DOI's regulations currently provide a 30-day window between the final agency determination and the taking of the land into trust. Nothing prevents the DOI from taking the land into trust at any time following the 30-day window or from violating its own regulation and taking the land into trust during the 30 days. Under petitioners' theory, as soon as the DOI takes the land into trust, sovereign immunity applies. Consequently, judicial review is only available at the whim of the DOI. See *Dep't of Interior* v. *South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting from decision to grant, vacate, and remand) (describing the DOI's view as "reviewability-at-the-pleasure-of-the-Secretary"). The DOI's position, in short, allows it, like Lucy holding a football for Charlie Brown, to pull away the opportunity for review once a lawsuit commences (or at such time as

the DOI perceives legal vulnerability). This is not consistent with the rule of law.

II. Patchak's substantial interest in this case satisfies prudential standing

Patchak has a clear interest in not having a casino as his neighbor. Petitioners have not argued that this interest is insufficient to satisfy Article III standing. Instead, they contend that the interest fails to establish prudential standing, but—as the D.C. Circuit correctly held—Patchak satisfies the zone-of-interests test.

The zone-of-interests test for prudential standing "is not meant to be especially demanding." *Clarke* v. *Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987). All that it requires is that "'the interest sought to be protected by the complainant [be] *arguably* within the zone of interests to be protected or *regulated* by the statute or constitutional guarantee in question.'" *Id.* at 396 (emphasis added) (quoting *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)).

When applying the test in the context of the APA, this Court has emphasized that "the APA's 'generous review provisions' . . . should be construed 'not grudgingly but as serving a broadly remedial purpose.'" *Id.* (quoting *Data Processing*, 397 U.S. at 156 (some quotations omitted)). This "liberal reading" promotes the rule that an APA claim "'is available absent some clear and convincing evidence of legislative intent to preclude review.'" *Id.* at 396 n.9 (quoting *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986)); see also *id.* at 397. Given the broad remedial purpose of allowing citizens to challenge illegal agency actions, the zone-of-

interests test denies a right of review only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*; see also *Thompson* v. *N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011).

The Band attempts to modify this test by arguing that Patchak cannot be within the zone of interests of the IRA—which the Band acknowledges largely "lacks any discernible statutory standards," Band Br. 15—because he is neither "an Indian or a tribal beneficiary of the Act" and because his interests do not "advanc[e] tribal development or self-governance." Band Br. 14, 42; see also *id.* (arguing that Patchak is "not a statutory beneficiary of the trust process"). The DOI similarly contends that §465's limitation as recognized in *Carcieri* is not "designed to benefit surrounding communities or individual non-Indians." DOI Br. 31. But the test is not whether a plaintiff is a statutory beneficiary. To the contrary, this Court has "consistently held that for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff.'" *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (quoting *Clarke*, 479 U.S. at 399–400); *id.* ("[I]n applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff."); see also *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970) (citing *Data Processing*). And the plaintiff's interest certainly need not conform to whatever public-minded purpose underlies the statute. See *Nat'l Credit Union*, 522 U.S. at 499 & n.8 ("Although it is clear that respondents' objectives in

this action are not eleemosynary in nature, under our prior cases that, too, is beside the point").

Indeed, if petitioners were correct that only intended beneficiaries of §465 (i.e., Indian tribes that gain land in trust) fall within its zone of interests, then even states and local governments do not have standing to enforce §465, and this Court's decision in *Carcieri* is a dead letter, because there is no one with an interest to enforce it. Notwithstanding Petitioners' protests to the contrary, §465 does not allow land to be taken into trust to benefit states, local governments, or members of the surrounding community. Rather, state and local governments "stand to lose taxing authority and some regulatory authority as a result of the Secretary's trust acquisition." DOI Br. 32; see also Band Br. 43–44 (noting that state and local governments' "regulatory authority over the trust lands is cut off or circumscribed by the Secretary's trust decision"). States and local governments have prudential standing for the same reason that Patchak does—to enforce the IRA's limitations.

The correct test, as recognized by this Court is that a plaintiff falls within a statute's zone of interests when "[t]here is sound reason to infer that Congress 'intended [petitioner's] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Clarke*, 479 U.S. at 403 (quoting *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984)). By considering whether "the interest sought to be protected by the complainant [is] arguably within the zone of interests to be . . . *regulated* by the statute," *id.* at 396 (emphasis added), the foundational statement of the zone-of-interests test proves this point. Patchak satisfies the test for just that reason: he is within the class of persons Congress could reasona-

bly have expected to enforce §465 and its limitations as articulated in *Carcieri*.

A. Patchak falls within the zone of interests of the Indian Reorganization Act

Patchak's claim falls within the IRA's zone of interests for two reasons. First, §465 includes a limitation on the DOI's authority to take land into trust for Indians, and Patchak is arguably within the class of persons that Congress intended to enforce that limitation. Second, land-use concerns such as Patchak's are relevant because a decision to take land into trust cannot be separated from the use to which that land may be put.

1. Patchak brought this suit to challenge an unlawful agency action—the DOI taking land into trust for a group that does not qualify as an Indian tribe under the IRA. As this Court recently recognized in *Carcieri*, §465 limits those who qualify as Indian tribes to "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." 129 S. Ct. at 1068. The class of persons who could be expected to enforce this limitation at least arguably includes members of the nearby community whose daily lives will be affected if the land were taken into trust. See *Clarke*, 479 U.S. at 403. Indeed, far from asserting interests "'inconsistent with the purposes implicit in the statute.'" as petitioners would have it, Band Br. 40, Patchak's desire as a member of the surrounding community to enforce a limitation specifically written into the text of the statute, *Carcieri*, 129 S. Ct. at 1065, effectuates Congress's express statutory intent. In short, because Congress arguably expected community

members like Patchak to enforce the statute, he falls within the IRA's zone of interests.

Petitioners concede that state and local governments are within the IRA's zone of interests but claim that affected members of the community like Patchak are not. DOI Br. 32; see also Band Br. 44. This distinction is unprincipled. Petitioners contend that states and local governments have prudential standing to assert the limitations of §465 because "they stand to lose taxing authority and some regulatory authority as a result of the Secretary's trust acquisition." *Id.* Yet this taxing and regulatory interest fails the petitioners' own proposed "beneficiaries only" prudential-standing test because it is not "an interest in advancing tribal development or self-governance." Band Br. 42; see also DOI Br. 33–34. The true reason the governments have standing is because they are enforcing a limitation of the statute—just as Patchak is.

Moreover, the fact that Congress imposed a limitation on the DOI's authority to take land into trust only for certain Indian tribes implies that Congress intended *someone* to be able to enforce that limitation. State and local governments cannot necessarily be relied upon to enforce §465's limitation, for those government entities might decide that they would rather enter into a gaming compact to benefit from an unlawful land-in-trust decision than challenge the unlawful agency action. See DOI Br. 32 ("[T]he State of Michigan has not sued to oppose the trust acquisition here. To the contrary, it has entered into a gaming compact with the Band. Similarly, Allegan County and Wayland Township (where the property is located) have actively supported the trust acquisi-

tion and the Band's economic-development efforts." (citations omitted)).

Consider, for example, a hypothetical situation where a group that has no Indian ancestry (perhaps a group of Nevada businesspeople) seeks recognition as an Indian tribe under the IRA so that it can open a casino in Michigan. If the DOI were to decide to take land into trust for the non-Indian group, that action would violate §465's limitation that the Indian tribe must have been "under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 129 S. Ct. at 1068. Yet because this agency action would (in petitioners' view) have nothing to do with land use, even a neighbor living adjacent to the land would not be able to challenge the *ultra vires* action. And the individual citizen might not be able to rely on the state or local government to sue, because those entities might prefer to enter into a gaming compact with the group and to share the profits from the casino. Given these considerations, it is at least arguable that Congress intended individual members of the community, and not just governmental entities, to be able to enforce §465's limitation. See *Data Processing*, 397 U.S. at 153 (examining "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected *or regulated* by the statute" (emphasis added)).

2. The land-in-trust decision cannot be separated from the use to which the land will be put, because simply taking the land into trust for an Indian tribe does not produce the desired economic benefit; an economic benefit arises only when that land is used. And §465 promotes economic development through *use* of the land, not through its *acquisition*;

after all, the tribe applying to have the land held in trust must hold the land in fee in the first place in order to have the government take it into trust. See BIA *Fee-to-Trust Handbook, Version II* at 8 (requiring fee-to-trust applications to include "[a] legal instrument" "to verify applicant ownership").

Despite the DOI's current litigation position, it has long acknowledged that decisions to take land into trust for an Indian tribe necessarily implicate land-use concerns. In 1980, the DOI promulgated regulations under the IRA that require the DOI to consider both "[t]he purposes for which the land will be used" and "potential conflicts of land use which may arise" before taking land into trust. 45 Fed. Reg. 62,036 (Sept. 1, 1980) (codified at 25 C.F.R. §151.10(c) & (f)). Those regulations also require the DOI to give notice to the public before taking the land into trust, 25 C.F.R. §151.12(b), so that affected members of the public may challenge the decision. The notice announcing the DOI's decision to take the relevant land into trust for the Gun Lake Band met this requirement by notifying the community that the land would "be used for the purpose of construction and operation of a gaming facility." 70 Fed. Reg. 25,596 (May 13, 2005). In light of this history, the Band's attempt to cast the land-in-trust decision as "independent" from land-use considerations, Band Br. 46, is inconsistent with the DOI's longstanding view of §465, not to mention the Band's concession that "[t]he purposes for which the land will be used bear *obvious relevance*" to whether land-in-trust decisions further the IRA's interests. *Id.* at 57 n.14 (emphasis added).

In sum, the fact that DOI regulations adopted under §465 expressly require the DOI to consider the

proposed land use demonstrates that the DOI long ago conceded that land uses and the conflicts they may cause are within §465's zone of interests.

The DOI attempts to distance itself from its own regulations by arguing that they represent only the views of the Secretary, not the views of Congress. DOI Br. 37. These regulations, however, fill a gap left by Congress, and therefore represent an agency interpretation of the gap that is entitled to controlling deference under *Chevron, U.S.A., Inc.* v. *Natural Resource Defense Council*, 467 U.S. 837 (1984). As the Band concedes, §465 "lacks any discernible statutory standards" governing the DOI's discretion to take land into trust. Band Br. 15; see also *MichGO* v. *Kempthorne*, 525 F.3d 23, 35 (D.C. Cir. 2008) (Brown, J., dissenting) (arguing that §465 is "a standardless delegation, allowing the Secretary of the Interior to take land in trust for whichever Indians he chooses, for whatever reasons," and therefore violates the non-delegation doctrine).

When Congress "has explicitly left a gap for the agency to fill, there is an express delegation of authority to elucidate a specific provision of the statute by regulation," and "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Given that the regulations themselves determine, in part, §465's meaning, their guidance that land-use concerns are relevant under §465 cannot be so easily pushed aside. E.g., *Hollywood Mobile Estates Ltd.* v. *Seminole Tribe of Fla.*, 641 F.3d 1259, 1269–70 (11th Cir. 2011) (explaining that "[u]nder [the zone-of-interests] test, we must examine the Indian Long-Term Leasing Act and its accompanying regulations to determine the interests

they arguably protect"). Put simply, it does not matter for the zone-of-interests test whether Congress enumerates the interests or gives authority for an agency to do so. And if a regulation is sufficiently authoritative to determine the very meaning of the statute, surely it is authoritative enough to illuminate a statute's zone of interests.

Chevron highlights another problem with the DOI's argument that the regulations do not matter. The DOI contends that §465 "has nothing to do with the interests asserted in Patchak's suit, which involve the effect of gaming . . . on nearby landowners." DOI Br. 10. But the DOI's regulations effectuating §465 expressly consider "[t]he purposes for which the land will be used" and "potential conflicts of land use which may arise." 25 C.F.R. §151.10(c) & (f). If it were true that the interests the regulations address have nothing to do with §465, then the regulations would be invalid.

3. Looking to other IRA provisions confirms that Congress did not intend to exclude community members from enforcing the IRA's limitations on land decisions. Section 463 directs the Secretary to consider "the public interest" when deciding whether to restore surplus lands to Indian tribes. 25 U.S.C. §463. Given that in both the restored-lands and the land-in-trust contexts the primary effect on the public interest arises from the use of the land, it is at least arguable that Congress was also concerned about how the use of lands held in trust would affect the surrounding community.

Petitioners assert that "the zone-of-interests analysis is limited to the particular 'statutory provision whose violation forms the legal basis for [the] complaint,'" which means that "it would have been

inappropriate for the court to consider the interests protected even by other provisions of the IRA itself." DOI Br. 32–33 (quoting *Lujan* v. *Nat'l Wildlife Fed'n*, 497 US. 871, 883 (1990)); see also *id.* at 10 ("the court of appeals erred by failing to limit its zone-of-interests analysis 'to the particular provision of law upon which the plaintiff relies'" (quoting *Bennett* v. *Spear*, 520 U.S. 154, 175–76 (1997))); Band Br. 15.

Despite the Court's statements in *National Wildlife Federation* and *Bennett*, this Court has not suggested that other provisions are irrelevant to the zone of interests—an approach that would defy this Court's usual method of statutory interpretation. See, e.g., *Samantar* v. *Yousef*, 130 S. Ct. 2278, 2289 (2010) ("[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole" (quoting *United States* v. *Morton*, 467 U.S. 822, 828 (1984)); *Dolan* v. *U.S. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . . ."). For example, last year in *Thompson*, the Court conclude[d] that the plaintiff fell "within the zone of interests protected by Title VII." *Id.* 131 S. Ct. at 870. Although the plaintiff sued under the specific anti-retaliation provision of Title VII, 42 U.S.C. §2000e-3(a), this Court did not limit its analysis to that provision, but instead referred to "the zone of interests protected by Title VII" as a whole. 131 S. Ct. at 870. Accord *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (examining the Federal Election Campaign Act of 1971 as a whole, and finding "nothing in the Act that suggests Congress intended to exclude voters from the benefits of [its] provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees").

4. Further, this Court's cases recognizing that competitors fall within the zone of interests of various statutes illustrate that plaintiffs who police a statute's limitations fall within that statute's zone of interests. In *Data Processing*, the case that introduced the zone-of-interests test, this Court addressed whether a data-processing company had prudential standing to challenge an agency ruling that national banks would be allowed to provide data-processing services, when a statute provided that "'[n]o bank service corporation may engage in any activity other than the performance of bank services for banks.'" 397 U.S. at 155 (quoting 12 U.S.C. §1864). The Court held that the competitors had standing to enforce the statutory limitation. *Id.* at 156. See also *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 619–21 (1971) (rejecting the argument that investment companies lacked standing to enforce a statutory provision that prohibited banks from underwriting or issuing securities).

The Band attempts to distinguish the competitor-standing cases by saying that in those cases, "Congress intended the relevant statutes to legislate against the very competition that plaintiffs sought to rein in." Band Br. 45 n.13. But this Court has expressly disclaimed such a limited interpretation of those cases. In *National Credit Union*, the defendants made the same argument: "Petitioners attempt to distinguish this action [from the competitor-standing cases] principally on the ground that there is no evidence that Congress, when it enacted the FCUA, was at all concerned with the competitive interests of commercial banks, or indeed at all concerned with competition." 522 U.S. at 495–96. This Court held that "[t]he difficulty with this argument is that similar arguments were made unsuccessfully

in each of *Data Processing*, *Arnold Tours*, *ICI*, and *Clarke*." *Id.* at 496; see also *id.* at 498 ("The provisions at issue . . . could be said merely to be safety-and-soundness provisions, enacted . . . without a concern for competitive effects. We nonetheless did not hesitate to find standing. We therefore cannot accept petitioners' argument that respondents do not have standing because there is no evidence that the Congress that enacted §109 was concerned with the competitive interests of commercial banks.").

The Band also argues that the prudential-standing doctrine reflects the principle that "federal courts should refrain from deciding questions that 'other governmental institutions may be more competent to address.'" Band Br. 39 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)). To be sure, that principle does explain the prudential-standing limitations that *Warth* actually discussed—namely, that a plaintiff may not assert "'generalized grievances' shared in substantially equal measure by all or a large group of citizens" and may not "rest his claim to relief on the legal rights or interests of third parties," *Warth*, 422 U.S. at 499. But *Warth* does not address the zone-of-interests test. Moreover, the principle of institutional competence is furthered, not harmed, by judicial review under §702, which is why Congress permitted the courts to review whether federal agencies are violating federal law. Deciding cases brought by plaintiffs with Article III standing about alleged violations of federal law falls squarely within the core competency of courts and offends no separation-of-powers principles. In any event, there is no plausible argument that Patchak's interest in not having the DOI illegally take land into trust so the Band can operate a casino in his neighborhood is a "generalized grievance."

B. Patchak's concerns are within the zone of interests of the Indian Reorganization Act when considering the integrally related Indian Gaming Regulatory Act

In its decision below, the D.C. Circuit considered the interests of both the IRA and the IGRA when applying the zone-of-interests test. DOI Pet. App. 8a. This approach is consistent with the decisions of this Court, especially *Clarke*, which determined the zone-of-interests by considering not only to the statutory provision that served as the basis for the plaintiff's claim, but also an integrally related statutory provision, even though the two provisions were adopted more than 60 years apart.

1. *Clarke* involved provisions from both the National Banking Act of 1864 and the McFadden Act of 1927. 479 U.S. at 401–02. The first provision, 12 U.S.C. §81, was originally enacted in 1864 and limited the general business of a national bank to its headquarters. 479 U.S. at 391; see *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 657 (1924) (quoting §81's original language). The second provision, 12 U.S.C. §36, adopted in 1927, allowed national banks to operate branches, but only *within* their home state, and amended §81 to cross-reference the new limitation imposed by §36. The dispute in *Clarke* arose when the Comptroller of Currency granted a national bank's application to offer discount brokerage services at locations *outside* its home state. When the plaintiff, a trade association representing securities brokers and investment bankers, challenged that agency decision as violating §36, the Comptroller responded that the plaintiff was "not within the zone of interests protected by the McFadden Act." *Id.* at 393.

The Court rejected the Comptroller's argument because it "focuse[d] too narrowly on 12 U.S.C. §36, and [did] not adequately place §36 in the overall context of the National Bank Act." *Id.* at 401. "Section 36," the Court explained, "is a limited exception to the otherwise applicable requirement of §81," *id.*, and "the interest respondent asserts has a plausible relationship to the policies underlying §§36 and 81 of the National Bank Act," *id.* at 403. Because the Court saw no indication of "a congressional intent to preclude review," the Court held that the plaintiff satisfied the zone-of-interests test. *Id.*; see also *Air Courier Conference of Am.* v. *Am. Postal Workers Union*, 498 U.S. 517, 529 (1991) (recognizing that *Clarke* applies to instances where the provisions of one statute have an "integral relationship" with the provisions of another statute).

This approach makes sense because prudential standing is a matter of inferring congressional intent, and this Court routinely looks to related statutes when interpreting a particular statute. See, e.g., *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) ("And it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes: 'The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them.'" (quoting *United States* v. *Freeman*, 3 How. 556, 564–65, 11 L.Ed. 724 (1845)). Regardless of when a particular statutory provision was enacted or whether it was codified in the same section as another provision, congressional intent must be analyzed by looking at related statutory schemes. This is particularly true

in the context of prudential standing, where the courts—not Congress—are creating the restriction on who can enforce the statute. Given that the courts are inferring the restriction in the first place, any indication that Congress sought to allow the suit should be respected.

Like the statutes in *Clarke*, the IRA and the IGRA are integrally related. This close relationship can be seen from their interrelated text and from the DOI's own approach to land-in-trust decisions. Consequently, Congress's intent regarding enforcement of the IRA must be analyzed by looking at the related provisions of the IGRA.

As to the statutory text, just as one of the statutes in *Clarke* limited the other, so too the IGRA limits the IRA. Section 465 of the IRA authorizes the DOI "to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians," and provides that such title or rights in the lands "shall be taken in the name of the United States in trust for the Indian tribe." 25 U.S.C. §465. The IGRA limits this authority by prohibiting gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe"—e.g., land acquired under §465—unless certain conditions are met. 25 U.S.C. §2719(a); see also 25 U.S.C. §2719(b)(1)(A) (expressly considering "the surrounding community"). In other words, the IGRA specifically limits the use of Indian trust lands for gaming. *Lac Courte Oreilles Band* v. *United States*, 367 F.3d 650, 653 (7th Cir. 2004) (the DOI's authority to take land into trust "is limited by IGRA"). This is the same type of integral relationship present in *Clarke*, where one provision is a limitation on the other one.

In practice, the IRA and the IGRA operate in tandem because unless land is taken into trust, such land ordinarily cannot be used for Class III gaming. The Band's land-in-trust application—which addresses requirements imposed by the DOI—highlights this integral relationship by repeatedly addressing the proposed land use of gaming and the requirements of the IGRA. The application's introduction explains how using the land for gaming will "promote tribal economic development" and "self-sufficiency." J.A. 41. These are the goals underlying the IRA: "[t]he overriding purpose of [the Indian Reorganization Act] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). When addressing "the purposes for which the land will be used," 25 C.F.R. §151.10(c), the Band specifically referenced gaming and the IGRA, explaining that it "intend[ed] to offer Class II and/or Class III gaming (as defined by the IGRA, 25 U.S.C. §2701 *et seq.*)." J.A. 61. When addressing "potential conflicts of land use which may arise," 25 C.F.R. §151.10(f), the Band again addressed gaming by detailing the measures that would be taken to attempt "to mitigate any impact on the surrounding community" that might arise from the gaming facility. J.A. 62–65. The Band's application also specifically addressed IGRA requirements, quoting §2719's limitations on gaming on land held in trust and addressing in detail why the Band believed it allowed the DOI to authorize gaming on this land. J.A. 67–74.

Thus, Patchak's interests fall within the IRA's zone of interests when considered in the context of the integrally related land-use provisions of IGRA.

See *TOMAC* v. *Norton*, 193 F. Supp. 2d 1982, 190 (D.D.C. 1982) (IGRA considers "effects on surrounding communities" and community members "are precisely the type of plaintiffs who could be expected to police these interests").

Both petitioners admit that Patchak's interests would fall within the zone of interests of the IGRA. The Band concedes that IGRA addresses "precisely the concerns that [Patchak] raises." Band Br. 47. And the DOI also admits as much, conceding that MichGO, which asserted interests similar to those asserted by Patchak, had prudential standing under the IGRA. DOI Br. 35. Compare Compl. ¶¶ 13–14, *MichGO* v. *Norton*, No. 1:05-cv-01181-JGP (D.D.C. June 13, 2005), ECF No. 1 (alleging that the casino "would detract from the quiet, family atmosphere of the surrounding rural areas" and asserting the specific adverse effects), with J.A. 31 (asserting similar adverse effects).

2. Despite the integral relationship between the IRA and the IGRA, the DOI contends that the D.C. Circuit erred by considering the IGRA because that statute was enacted "some 54 years after the IRA" and because Congress could not "even have imagined" that a land-in-trust decision could affect the interests of those living near the land. DOI Br. 34, 35. But in *Clarke*, the limitation imposed in §36 of the McFadden Act was enacted some 63 years after Congress enacted the National Bank Act and the original version of §81. 479 U.S. at 401, 403; see also *Japan Whaling*, 478 U.S. at 230 n.4 (examining the zone of interests in two statutes enacted 13 years apart). And Congress expressly linked IRA §465 to the IGRA, by including language in IGRA regarding "lands acquired by the Secretary in trust for the

benefit of an Indian tribe." 25 U.S.C. §2719. In sum, it does not take much imagination to see that a change in land use to allow otherwise illegal gambling activity will affect the surrounding community.

This case is very different from *Air Courier*, 498 U.S. at 530, where, as petitioners correctly point out, the only relationship between the two statutes at issue there was that they were both included in the general codification of the postal statutes. DOI Br. 36; Band Br. 49. Here, §2719 is a specific limitation on the DOI's authority to take land into trust under §465.

The Band also argues that *Air Courier* demonstrates that two statutory provisions can be integrally related only "when the two statutory provisions are *within the same statute*." Band Br. 48–49. But *Air Courier* does not stand for that proposition, *Clarke* refutes it, and it would be absurd given that Congress frequently enacts related provisions in different statutes, which must then be interpreted together.

* * * * *

In the end, Patchak is not the sort of marginally related plaintiff that Congress would not have intended to bring an APA suit. To the contrary, he has a concrete, obvious interest in whether a casino complex will be built on trust land in close proximity to where he lives, and he is precisely the sort of plaintiff Congress would want to enforce the IRA's statutory limitations. As the D.C. Circuit recognized, it would be "very strange to deny Patchak standing in this case." DOI Pet. App. 10a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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March 20, 2012

APPENDIX[1]

STATUTORY PROVISIONS INVOLVED

1. 5 U.S.C. §702 provides:

Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

---

[1] The text is from the 2010 edition of the United States Code.

2. 25 U.S.C. §463 provides in pertinent part:

Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

* * * * *

3. 25 U.S.C. §465 provides:

Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the

Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

4. 25 U.S.C. §2719 provides:

Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

* * * * *

5. 28 U.S.C. §1346 provides in pertinent part:

United States as Defendant

* * * * *

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

* * * * *

6. 28 U.S.C. §1402 provides in pertinent part:

United States as Defendant

* * * * *

(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts.

* * * * *

7. 28 U.S.C. §2409a provides:

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not

apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent

of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities,

shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's in-

tention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

REGULATIONS INVOLVED[2]

25 C.F.R. Part 151 provides in pertinent part:

§151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already

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[2] The text is from the 2011 edition of the Code of Federal Regulations.

owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

§151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in §151.10 (a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and

the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to §151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

§151.12 Action on requests.

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.

(b) Following completion of the Title Examination provided in §151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a news-

paper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

REPLY BRIEF

ECORD
AND

Nos. 11-246 and 11-247

In The
Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Petitioner,

v.

DAVID PATCHAK, *ET AL.*,

Respondents.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,

Petitioners,

v.

DAVID PATCHAK, *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The
Supreme Court of the United States

Nos. 11-246 and 11-247

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

DAVID PATCHAK, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

Respondent seeks a declaratory judgment and injunction forcing the United States to relinquish title to and protective control over Indian trust lands. In seeking such unprecedented relief, respondent does not deny that, prior to enactment of the Quiet

Title Act ("QTA"), 28 U.S.C. § 2409a, his suit would have been completely barred by sovereign immunity. Moreover, after the QTA was enacted, his suit was triply barred because of (i) Congress's express protection of Indian trust lands from suit, 28 U.S.C. § 2409a(a), (ii) the statutory requirement that plaintiffs seeking "to try the Federal Government's title to land" could do so only if they possessed their own legal interest in the land, *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 285 (1983); *see* 28 U.S.C. § 2409a(d), and (iii) the Act's explicit bar against injunctive relief forcing the United States to surrender title to land, 28 U.S.C. § 2409a(b) & (c).

Nonetheless, respondent argues that, precisely because of Congress's deliberate exclusion of his claim under the QTA, he can use the Administrative Procedure Act ("APA") to make the exact same challenge to United States title foreclosed by the QTA and to obtain the exact same relief forbidden by the QTA.

That stands sovereign immunity principles on their head. He does not cite a single case from this Court permitting such easy circumvention of explicit congressional limitations on suits against the United States, let alone the "special sovereignty interests" implicated when the sovereign's control of land is at stake, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997).

Respondent's position also turns logic upside down, because still missing from his argument is any coherent explanation of why Congress would have wanted to permit *only* those plaintiffs lacking any legal interest in the land to divest the United States

of title, while closing the courthouse doors to those who claim direct title to the land and thus are most grievously injured by the government's actions. Respondent's only answer (Br. 33) is that his interest is "*different.*" It certainly is. So much so that it is dubious whether respondent's proposed reading of the QTA's and APA's intersection would survive even rational-basis scrutiny.

Respondent's claim to prudential standing fares no better. It is an open plea to recycle through litigation under one statute (the Indian Reorganization Act) a claim already litigated and lost—foreclosed by precedent—under another statute (the Indian Gaming Regulatory Act ("IGRA")). This Court has held time and again that prudential standing must be tied to interests protected by the statutory provision under which suit is brought. But the Reorganization Act provision under which respondent attempts to litigate his objections to gaming was enacted 45 years before organized gaming on tribal lands even started and more than a half century before enactment of the IGRA provisions that respondent claims should be imported into the Reorganization Act. It would vastly expand the prudential standing doctrine for this Court to hold that a plaintiff's asserted injuries can travel across time as well as statutes.

I. THE QUIET TITLE ACT BARS ADMINISTRATIVE PROCEDURE ACT SUITS DISPUTING THE UNITED STATES' TITLE TO INDIAN TRUST LANDS

A. The QTA's Text Fully Immunizes Indian Trust Lands

Congress expressly excised "trust or restricted Indian lands" from any suit "disput[ing] title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The fundamental flaw in respondent's argument is that he reads that deliberate shield of protection as silently agnostic about the susceptibility of those same Indian lands to APA suits "disputing [United States'] title."

The plain text forecloses such a cramped reading of a textually unqualified reservation of sovereign immunity. Congress said that "[t]his section"—*i.e.*, the QTA's entire waiver of sovereign immunity—"does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). The QTA thus provides a comprehensive carve-out of those Indian lands from any aspect of Congress's waiver of immunity for any litigation "disput[ing] title" held by the United States to "real property." *Id.* As to such lands, the waiver of immunity simply "does not apply," *id.*, and sovereign immunity is expressly preserved intact, *see United States v. Mottaz*, 476 U.S. 834, 843 (1986) ("[W]hen the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.").

Respondent argues (Br. 15-16) that, because the QTA's subsequent provisions appear to limit relief to

plaintiffs asserting their own "right, title, or interest" in land, 28 U.S.C. § 2409a(d), Congress's reservation of sovereign immunity must be similarly cabined since "an exception to a waiver cannot exceed the scope of the waiver itself" (Br. 22). But that argument confuses the scope of the QTA's waiver of immunity with the pleading requirements for a successful complaint. Provisions identifying what a qualifying plaintiff must do to prevail perform quite a different function from those that define the scope of lawsuits that are designedly closed out of litigation altogether. That is triply true here.

First, the Indian lands provision is more than an "exception" to waived immunity. It is a comprehensive and categorical walling off of any and all challenges to United States' title to or legal interest in Indian trust lands. *See Block*, 461 U.S. at 283 (Indian-lands provision "limit[s] the waiver of sovereign immunity"). To put it another way, in enacting the QTA, Congress surveyed the government's interests in land and not only specified the terms on which suits could go forward, but also took certain categories of federal land interests—trust or restricted Indian lands—completely off the litigation table. That was a land-focused, not plaintiff-specific, judgment.

Second, respondent's argument reads the statute backwards. The Indian lands provision appears at the very beginning of the QTA and follows immediately after and corresponds to the Act's waiver of immunity for "a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The two sentences must be read together and the reservation of

immunity given *at least* corresponding breadth. *See Mottaz*, 476 U.S. at 842 (QTA "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians").

The reservation of immunity for Indian lands, moreover, is simply the first clause of a sentence. The second clause adds that the waiver of immunity "does [not] apply to or affect actions which may be or could have been brought under" a variety of alternative statutory schemes, such as the Tucker Acts, the Federal Tort Claims Act, and tax laws. 28 U.S.C. § 2409a(a). Because many of those schemes will only infrequently implicate plaintiffs who are themselves asserting a "right, title, or interest" in land under subsection (d), the QTA's statutory limitations on the waiver of immunity in Section 2409a(a) were necessarily meant to be broader and more comprehensive than just the pleading contours imposed on those who have navigated past the QTA's exclusions.

In other words, in waiving immunity, Section 2409a(a) quite naturally focuses on the nature of the *United States'* legal interests because that is what waivers of immunity do. The reservation of full immunity for trust or restricted Indian lands likewise makes the *United States'* legal interest and the status of its lands dispositive. The provision governing complaints naturally focuses, by contrast, on the *plaintiffs'* legal interests and what requirements Congress has interposed as a precondition for relief under the QTA, which is something quite different.

Third, and in any event, the QTA's waiver of immunity and the preservation of immunity for

Indian lands are (at least) fully symmetrical. Congress waived sovereign immunity for "a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). *Every* challenge to the United States' legal interest in Indian "trust" lands necessarily involves "a disputed title" because all Indian trust lands entail a transfer of legal title to the federal government. *See* 25 U.S.C. § 465.

B. The QTA Deliberately Excludes Challenges To United States' Title Unconnected To Any Legal Interest In The Land

Respondent's basic premise about how statutes like the QTA and the APA intersect is also wrong. His argument assumes that plaintiffs whose claims are deliberately excluded by Congress from suit under a "precisely drawn, detailed statute" waiving immunity like the QTA, *Block*, 461 U.S. at 285, remain free to resort to general remedial schemes like the APA to obtain the relief denied them under the more particularized scheme. That is incorrect.

In *United States v. Fausto*, 484 U.S. 439 (1988), for example, this Court addressed the availability of judicial review under the Civil Service Reform Act, which permitted competitive service employees to obtain judicial review of personnel actions, but provided no judicial review for nonpreference excepted service employees, 484 U.S. at 446-447. Respondent's argument mirrors the lower court in *Fausto*, which "viewed the exclusion of nonpreference members of the excepted service *** as congressional silence on the issue of what review these employees should receive," *id.* at 447, and thus permitted them

to seek relief under the general remedial provisions of the Backpay Act. This Court disagreed and held, instead, that such a "deliberate exclusion" of a category of employees from a statute's judicial review provisions, *id.* at 455, reflected a "congressional judgment that those employees should not be able to demand judicial review" for their personnel actions, *id.* at 448.

So too here, the QTA does not simply overlook or leave unaddressed the availability of judicial review for plaintiffs seeking to challenge the United States' title to trust or restricted Indian lands. Quite the opposite, the statutory text addresses such claims twice, by both walling them off from judicial review and expressly proscribing the very type of specific or injunctive relief provided by the APA, *see* 28 U.S.C. 2409a(b) & (c). That "deliberate exclusion *** prevents respondent from seeking review" and injunctive relief under the more general provisions of the APA. *Fausto*, 484 U.S. at 455; *see Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("Where a statute provides that particular agency action is reviewable at the instance of one party" under specified conditions, "the inference that it is not reviewable at the instance of other parties *** is strong."); *Mottaz*, 476 U.S. at 847 (QTA barred suit under the General Allotment Act that would "require the Government to relinquish its possession of the disputed lands," because the QTA "expressly gives that choice to the Government, not the claimant").

Block v. Community Nutrition Institute, 467 U.S. 340 (1984), says the same thing. There, the relevant statute permitted only milk producers and handlers to seek review of the Secretary of Agriculture's milk

pricing orders. When consumers tried to challenge a pricing order under the APA, this Court said "no." "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 349.

The test for whether a particularized scheme's exclusion was deliberate or (as respondent argues) simply left plaintiffs to other procedural devices is whether "congressional intent to preclude judicial review is 'fairly discernible,'" *Community Nutrition*, 467 U.S. at 351, considering the statute's text, structure, objectives, and history, and the nature of the administrative action involved, *id.* at 345. Because, in *Community Nutrition*, permitting consumers to vindicate their interests under the APA would have circumvented the limitations on suits prescribed in the statute and would have permitted injunctive relief "even though such injunctions are expressly prohibited in proceedings" under the statute, *id.* at 348, this Court held that the suit was foreclosed, *id.* at 345-351.

This case is the same. Congress's intent to permit only certain plaintiffs to challenge governmental activity—those claiming title to or legal interest in non-Indian land—and to exclude those plaintiffs lacking such a legal interest is "fairly discernible" in the QTA. The unqualified scope of the QTA's textual retention of immunity for all trust or restricted Indian lands from all claims disputing United States' title and the express preclusion of coercive injunctive relief underscore the deliberateness with which Congress confined judicial

review to that particular class of plaintiffs claiming a legal interest in non-Indian land. Those plaintiffs, after all, are the ones that are most harmed by any governmental error. *See* S. Rep. No. 575, 92d Cong., 1st Sess. 1 (1971); *see also* S. Rep. No. 996, 94th Cong., 2d Sess. 7-8 (1976).

Furthermore, allowing APA suits would empower the very plaintiffs that Congress foreclosed from relief under the QTA to obtain injunctive relief "even though such injunctions are expressly prohibited in proceedings" under the QTA, *Community Nutrition*, 467 U.S. at 348, whenever the United States wishes to retain its legal interest, 28 U.S.C. § 2409a(b) & (c).

Still worse, opening the APA door would arm even those individuals permitted to go forward under the QTA "with a convenient device for evading the [QTA's] statutory requirement[s]," *Community Nutrition*, 467 U.S. at 348, simply by repackaging their litigation as one that seeks to redress harms to their aesthetic, environmental, or personal interests.

Permitting APA actions would also confound the QTA's flat 12-year statute of limitations, 28 U.S.C. § 2409a(g), by creating serial opportunities for APA injunctive relief stripping the United States of title any time an intervening agency action occurs on the land. *See Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122-123 (2005) (specialized statutory scheme precluded resort to suit under 42 U.S.C. § 1983, in part because the specific statute "limits relief in ways that § 1983 does not"); *Brown v. GSA*, 425 U.S. 820, 826-828 (1976) (specialized statutory scheme under Title VII for federal employees precluded resort to Title VII's general remedies).

In short, in the QTA, Congress determined that those asserting legal claims to or interest in the land itself could best "be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated," *Block*, 467 U.S. at 352. And if any question remains, this Court must err on the side of preserving sovereign immunity. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012).

C. The QTA's History And Purpose Require The Categorical Protection Of Trust Lands From Suit

Principles of repose and stability of title are critical for land to be put to productive use, and those concerns are at their apex in the context of tribal lands. The Indian Reorganization Act empowered the United States to take land into trust as a means of combating rampant poverty and unemployment plaguing tribal members, and promoting economic development. *See* Pet. Br. 41-42.[1] None of that can occur in an environment where the stability of title and jurisdictional status of land is subject to perpetual revision via declaratory and injunctive litigation. Only by putting Indian trust lands off limits under the QTA could Congress ensure a stable and sound foundation for economic and cultural development both on Indian lands and in the surrounding communities. *See* Wayland Township Br. 14-17; NCAI Br. 8-14.

The QTA's categorical retention of sovereign immunity over tribal lands also reinforces the

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[1] "Pet. Br." refers to the opening brief filed by petitioner in No. 11-246.

principle that "Indian title is a matter of federal law and can be extinguished only with federal consent," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). *See* Pet. Br. 18-20.

Indeed, unlike most federal lands, litigation over the United States' title to Indian lands directly implicates the legal interests of a third party not before the court and whose sovereign immunity Congress did not waive—the relevant tribe. Preserving full immunity thus was necessary to avoid creating a legal regime in which "[a] unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *Mottaz*, 476 U.S. at 843 n.6.

Those concerns do not lessen just because the plaintiff lacks a legal interest in the land at issue. That is why Congress tied Indian-lands immunity not to the content of plaintiff's complaint, but to the land itself and to the United States' distinct interests "based on that property's status as trust or restricted Indian lands." *Mottaz*, 476 U.S. at 843.[2]

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[2] Respondent argues (Br. 18) that the plaintiff's interest in the land was critical in *Mottaz*. But in applying Section 2409a(a)'s Indian-lands' barrier to suit, it was the nature of the *United States'* interest that controlled the outcome. 476 U.S. at 843 (sovereign immunity would have attached if "the United States [had] claim[ed] an interest in [the] real property based on that property's status as trust or restricted Indian lands"). The opinion later discussed Mottaz's interest in acquiring title, but only to hold that Mottaz could not circumvent the QTA by invoking more general remedial schemes. *Id.* at 846-851. That same anti-circumvention rule is why respondent loses as well.

Finally, respondent never comes to grips with the irrationality of the "inverted preference" scheme his position would create, *Fausto*, 484 U.S. at 450, by allowing those plaintiffs who lack any legal interest in the land to file suit with a far more elastic statute of limitations and to obtain the very specific injunctive relief prohibited by the QTA, while excluding those who actually claim title to the land. Indeed, his reading would transmute a QTA provision meant to *limit* consent to suit into one that *expands* consent to suit and *expands* the remedies available by opening the APA door. Congress surely did not mean to do that.

Respondent protests that his interests are just "*different*" (Br. 33), not lesser, than plaintiffs who claim a legal interest in the land. That is hard to understand. Plaintiffs with interests in land would also share respondent's aesthetic objections to the (alleged) improper usages of the land, desire to "hold[] a federal agency accountable," and zeal to correct "unlawful action." Resp. Br. 8, 34, 39.

But whatever the adjectival label, it does not explain why Congress would have deputized respondent to "police" agency action (Pet. App. 6a; *see* Resp. Br. 46) and to have *greater* remedial options—including injunctive relief ousting the United States of title and control over land—than those with a direct stake in the land. If Congress had passed a law that, in terms, codified such a stark disparity in the enforceability of legal rights, one would be hard-pressed to articulate a rational basis for it.

D. Section 702 Of The APA Equally Forecloses Relief

Section 702 of the APA is explicit that it does not "affect[] other limitations on judicial review *** [or] confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. This Court has already held, moreover, that "[t]he QTA is such an 'other statute'" within the meaning of Section 702. *Block*, 461 U.S. at 286 n.22.

Respondent nevertheless argues (Br. 14) that Section 702 has no application because the QTA does not "grant[] consent to suit" on his particular claim, 5 U.S.C. § 702, since he lacks a legal interest in non-Indian land. But respondent's claim-specific approach is in the teeth of *Community Nutrition*. There, as in the QTA, the comprehensive statutory scheme granted only certain categories of plaintiffs (milk producers and handlers) the right to challenge governmental action. 467 U.S. at 349. Just like respondent's statutory exclusion from relief under the QTA, claims by consumers were left out of the review provisions in *Community Nutrition*. Accordingly, because the QTA "provides a detailed mechanism for judicial consideration" of challenges to United States' title "at the behest of particular persons," then "judicial review of those issues at the behest of other persons" like respondent is at least "impliedly precluded." *Id.*

Furthermore, nothing in APA Section 702 says that the "other statute" must grant the *plaintiff* consent to sue. It says APA litigation is barred simply if the statute "grants consent to suit" over a specified subject matter, which the QTA does for

disputes targeting United States' title. 5 U.S.C. § 702.[3] The only relevant question then is whether the QTA also "expressly or impliedly forbids the relief which is sought," *id.*, which the QTA's provisions flatly banning coercive injunctive relief dispossessing the United States of title specifically do. 28 U.S.C. § 2409a(b) & (c).

Indeed, just like the plaintiff in *Mottaz*, respondent seeks injunctive relief that would "require the Government to relinquish its possession of the disputed lands," even though the QTA "gives that choice to the Government, not the claimant." 476 U.S. at 847. *Cf. Couer d'Alene*, 521 U.S. at 281 (suit for injunctive relief against state officials concerning State's title to land is barred as "the functional equivalent of a quiet title action"). Because the relief respondent seeks is forbidden even for plaintiffs to whom the QTA grants consent to sue, that same relief is doubly forbidden as to those for whom Congress barred suit altogether. And that sovereign-immunity judgment is what APA Section 702 enforces.

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[3] *See* H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13 (1976) ("If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended that provision for relief to be exclusive."); S. Rep. No. 996, 94th Cong., 2d Sess. 11 (1976) (same).

II. RESPONDENT LACKS PRUDENTIAL STANDING

A. Respondent Falls Outside Section 465's Zone Of Interests

For forty years, this Court's prudential standing doctrine has required plaintiffs suing under the APA to establish that they fall within the zone of interests of the statute they seek to enforce. *See, e.g., Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-157 (1970). That means that respondent must show that the legal injuries of which he complains— his concerns over the impact of gaming on the community's environment and aesthetics—are the type of interests that the Indian Reorganization Act's land-into-trust provision, 25 U.S.C. § 465, "protect[s] or regulate[s]." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987).

Respondent cannot do that. He does not claim to be protected by or a beneficiary of Section 465 of the Reorganization Act. He argues (Br. 38), instead, that he is "regulated" by that provision. Not so. Nothing in the Reorganization Act commands, directs, limits, or even cajoles respondent's own activities on or off of his own land. And whatever respondent's personal preference for a "rural" lifestyle at his home three miles away from the casino, Br. 5; J.A. 28, 30-31, C.A. App. 549, the decision to zone the area where the casino sits between a highway and railroad line for "'light industrial and commercial uses'" is a product of local law, not of Section 465. *See Michigan*

Gambling Opposition v. Norton, 477 F. Supp. 2d 1, 10 n.13 (D.D.C. 2007).[4]

What respondent really means (Br. 38-39) is that he has been affected by the Secretary's actions because his aesthetic enjoyment of the "area" (*id.* at 5) will be diminished. But if simply alleging an impact or effect sufficed, then the prudential-standing and Article III-standing inquiries would collapse together. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (Article III standing requires, *inter alia*, that plaintiff have "suffered an 'injury in fact' *** [that is] 'fairly *** trace[able] to the challenged action of the defendant'").

In any event, respondent has not identified anything in the Secretary's land-into-trust decision itself that has affected his land or caused him or his "area" any harm. The trust status of a piece of private property has no adverse effect on him, and even less so does the question of the interrelationship between Gun Lake and the federal government in 1934.[5]

Instead, respondent's alleged injuries are tied exclusively to Gun Lake's post-trust decision to operate a casino on just a portion of the land. That

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[4] Respondent's land is roughly the same distance from the casino as Arlington Cemetery is from this Court. *See* J.A. 28; C.A. App. 549.

[5] While not presented here, respondent's argument that Gun Lake was not "under Federal jurisdiction" in 1934, 25 U.S.C. § 479, is without basis. The Tribe was a party to several treaties, received federal Indian services, and was under the administrative jurisdiction and supervision of the Office of Indian Affairs throughout the relevant time.

outcome, however, is the product of combined decisions by (i) Gun Lake to undertake gaming, (ii) the State of Michigan to approve a gaming compact, (iii) the Secretary's determination under IGRA, 25 U.S.C. § 2719, that the land was eligible for gaming; and (iv) the discretionary decisions of the National Indian Gaming Commission to approve a gaming ordinance and facility license, *id.* § 2710; 25 C.F.R. §§ 559.1, 559.2. Respondent does not challenge any of those decisions.

Respondent argues (Br. 41) that the Secretary's land-into-trust trust determination "cannot be separated" from Gun Lake's decisions concerning how its land will be used because "economic benefit arises only when that land is used." That is not right either.

First, the trust decision is only for "the purpose of providing land for Indians." 25 U.S.C. § 465. Economic development is one option; oftentimes, however, the trust land is acquired to restore historic lands, to build housing, to preserve natural resources, or for hunting and gaming rights. *See, e.g.*, NCAI Br. 17-27. Whether to use the land for economic development or another purpose is up to the tribe; no particular use is dictated by or follows from the trust decision. And even if the tribe decides to undertake economic development, the vast majority of economic uses of trust land are non-gaming. *Id.* at 17 n.12.

Second, even when gaming is undertaken, the trust and gaming decisions are not only capable of separation, they have been legislatively and administratively separated. Congress housed the regulation of gaming in an entirely different statute (IGRA) and created an entirely new entity—the National Indian Gaming Commission—to administer

that statute and to make gaming ordinance decisions, 25 U.S.C. § 2702.

Thus the ineluctable Restoration Act/IGRA linkage on which respondent tries to ground prudential standing simply does not exist in law or fact. Instead, whether or not gaming ever occurs on trust land requires the intervention of multiple different decisions by multiple separate entities. By the same token, taking the land out of trust would not itself stop gaming. Michigan and its residents would remain free under state law to authorize gaming by either a private entity or by Gun Lake's own gaming corporation. *See* Mich. Const. Art. IV, § 41 (eff. 2004). Because the cause of injuries and their remediation depend on the intervening judgments of independent actors and not the operation of Section 465, prudential standing fails. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

B. Respondent's Interests Are Not Like Those Of State And Local Governments

Respondent echoes (Br. 38) the court of appeals' reasoning (Pet. App. 11a) that, because state and local governments have prudential standing to enforce the Reorganization Act's limitations on land-into-trust decisions, so too should every individual in the community.

But if prudential standing means anything, it means that the nature of interests and injuries matter dispositively. The reason that States and local governments have prudential standing to challenge land-into-trust decisions is that such

decisions themselves directly restrain and contract their sovereign power, taxing authority, and jurisdictional control over land. *See Nevada v. Hicks*, 533 U.S. 353, 361-362 (2001) (discussing limits on state regulatory authority over Indian lands). Indeed, the loss of "State and local taxation" authority appears on the face of the statute. 25 U.S.C. § 465.

Respondent (Br. 40-41) and his amici California Groups (Br. 12) argue that, unless he is afforded standing, sometimes no one will sue, which they argue violates the presumption of judicial review for administrative action. They worry, in particular, that state and local governments might adopt zoning decisions and economic development plans that are compatible with trust lands, but with which they disagree, Resp. Br. 40-41; California Groups Br. 12.

Even if one assumes that, for every government action, there must be an equal and opposing plaintiff available to sue, that argument fails. This case has nothing to do with the availability of judicial review. Respondent and anyone else opposed to gaming had plenty of opportunity to file suit and seek review under IGRA, the QTA, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h, or any other applicable statute of the same concerns respondent raises. Indeed, an anti-gaming lawsuit was filed and litigated challenging this very trust decision. *See Michigan Gambling, supra*. The Secretary publicly announced the decision to place this land into trust in advance and afforded respondent and any other "interested parties" the opportunity to seek judicial review of the decision within 30 days. 70 Fed. Reg. 25,596 (May 12, 2005). The Secretary then further

delayed the trust placement for three years until the litigation brought by respondent's interest group raising the very anti-casino concerns that respondent reiterates here was concluded by this Court's denial of certiorari, *Michigan Gambling Opposition v. Kempthorne*, 555 U.S. 1137 (2009). *See* Pet. App. 31a n.10; Pet. Br. 8.

So what respondent and his amici actually want is a judicial presumption enforcing an even longer period of time in which to seek still more review, and re-review of gaming objections. There is no such presumption. And their distrust of the judgments of state and local governments (Resp. Br. 40-41; California Groups Br. 12) simply ignores the extensive litigation that has arisen challenging land-into-trust decisions under a variety of federal laws by governments, not to mention the federalism-based respect for the historic primacy of state and local governments in making land-use and zoning decisions.

Finally, respondent tries to squeeze himself into the prudential standing mold by arguing (Br. 38-39) that Congress "could reasonably have expected [him] to enforce §465." But, as respondent admits (Br. 38), the test for prudential standing is whether Congress "'*intended*'" an individual "'to be relied upon to challenge agency disregard of the law,'" *Clarke*, 479 U.S. at 403 (emphasis added), not whether a reasonable Congress should have "expected" attempted litigation. And when it comes to evidencing such congressional intent, respondent once again comes up short.

First, it is inconceivable that Congress ever intended the Reorganization Act to become a vehicle

for vindicating anti-gaming interests because tribal gaming did not even come into existence until more than four decades *after* the Reorganization Act's passage. *See* Felix S. Cohen, *Handbook of Federal Indian Law* § 12.01 (2005 ed.); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). Nor were community-aesthetic injuries recognized by this Court as a basis for standing to challenge governmental actions until the 1970s. *See Association of Data Processing*, 397 U.S. at 154.

Second, respondent argues (Br. 44) that Section 463 of the Reorganization Act "directs the Secretary to consider 'the public interest' when deciding whether to restore surplus lands to Indian tribes." Even assuming that respondent is a better arbiter of the "public interest" than the nine governmental entities and eight private business and community groups that support the Secretary's trust decision in this case, *see* Wayland Township Br., that statutory argument proves Gun Lake's point because Congress omitted that same "public interest" factor from Section 465's land-into-trust provision. And unsurprisingly so because Section 465 governs the treatment of *private* land, not surplus *public* lands. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States* 464 U.S. 16, 23 (1983).

Contrary to respondent's argument (Br. 45), neither *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011), nor *FEC v. Akins*, 524 U.S. 11

(1998), invoked the purpose of statutes as a whole to create prudential standing that would not otherwise exist under an individual provision. Anyhow, *Russello* would dictate a different answer to that holistic inquiry than the one respondent wants.

Third, Interior Department regulations outlining factors for the Secretary's land-into-trust decisions do not help respondent. Those regulations address only the interests of "the state and local governments having regulatory jurisdiction over the land to be acquired," and afford an opportunity for *those governments* to submit "comments as to the acquisition's potential impacts on regulatory jurisdiction" and land use. 25 C.F.R. §§ 151.10, 151.11. What is far more telling—and irreconcilable with respondent's position—is that the regulations do not provide any notice to or opportunity for input from individuals like respondent until *after* the final trust decision has been made. 25 C.F.R. § 151.12(b).

Finally, this Court's "competitor prudential standing" cases do not show that *any* plaintiff "who police[s] a statute's limitation fall[s] within that statue's zone of interests" (Resp. Br. 46). They hold only that, when a plaintiff's interest in limiting the activities of the companies against which it competes enforces key limitations of a statute, prudential standing may attach if Congress designed those limitations to protect competitors. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 496-499 (1998); *Clarke*, 479 U.S. at 397 (plaintiffs "not only suffered actual injury, but *** suffered injury from the competition that Congress had arguably legislated against by limiting the activities available to [competitors]").

There is no such link here. While state and local governments compete directly with the tribes and federal government for the jurisdictional and taxing authority that the Reorganization Act allocates, respondent does not.

C. Borrowing Interests From The Indian Gaming Regulatory Act Does Not Support Prudential Standing Under The Reorganization Act

This Court has held, time and again, that only "the statute whose violation is the gravamen" of respondent's suit can be the "'relevant statute'" for purposes of the zone-of-interests test. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 886 (1990).

Respondent nevertheless insists (Br. 48) that he can borrow interests to support standing from IGRA, because he deems that law "integrally related" to Section 465. But *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991), precludes precisely such inter-statutory "leapfrog[ging]" to satisfy the zone-of-interests test, *id.* at 530. *See* Pet. Br. 49.

Respondent argues (Br. 48) that *Clarke* supports hybridizing statutory interests because this Court looked to the McFadden Act in assessing the National Bank Act's zone of interests. But that was just because the McFadden Act amended the relevant provision of the Bank Act. *See Clarke*, 479 U.S. at 391; *see also Air Courier Conference*, 498 U.S. at 530 (describing *Clarke*'s analysis of "two sections of the National Bank Act"). Thus, the relevant provisions of the McFadden Act and the National Bank Act were

one and the same. The Reorganization Act and IGRA are not.

Confining prudential standing to the statute sued under makes particular sense because the text of the APA requires that respondent's interests arise from the "relevant statute" upon which his claim rests, 5 U.S.C. § 702, not some statute akin to the one under which he is suing. Otherwise plaintiffs could reincarnate under a new statute claims already litigated and lost by others under the original statute—which is precisely what respondent is attempting here.[6]

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[6] Respondent stresses (Br. 36) "the APA's 'generous review provisions.'" But respondent was afforded ample opportunity to file suit under IGRA, NEPA, or any statute for which he had standing. "[G]enerous review" is not limitless review "by every person suffering injury in fact," *Clarke*, 479 U.S. at 395, 396 n.9, and certainly does not extend to either recycling tried-and-failed claims under different statutory headings or a do-over of litigation strategy decisions from others' earlier rounds of unsuccessful judicial review.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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REPLY BRIEF

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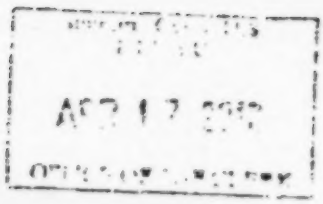

Nos. 11-246 and 11-247

In the Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In the Supreme Court of the United States

No. 11-246

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondent Patchak seeks an order compelling the Secretary of the Interior to relinquish title to a parcel of land in Wayland Township, Michigan (the Bradley Property), that the United States currently holds in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Band). Patchak's suit is barred for two independent reasons: first, the United States has not waived its sovereign immunity from suits challenging its

title to Indian trust lands; and second, Patchak lacks prudential standing because the injury he alleges is not within the zone of interests protected or regulated by the statutory provision on which he relies. The court of appeals erred in allowing Patchak's suit to proceed, and Patchak's efforts to defend its holding are unavailing.

I. PATCHAK'S SUIT IS BARRED BY SOVEREIGN IMMUNITY

As this Court has explained, "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Earlier this Term, the Court reaffirmed that "an unmistakable statutory expression of congressional intent" is required to waive that immunity. *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012). No such expression exists here. In particular, because neither the Quiet Title Act (QTA), 28 U.S.C. 2409a, nor the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, waives the sovereign immunity of the United States in the circumstances of this case, Patchak's suit is barred by sovereign immunity.

The QTA permits the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a). But that waiver of immunity is limited in two ways that are important to this case. First, because the QTA "does not apply to trust or restricted Indian lands," *ibid.*, it "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians," *United States* v. *Mottaz*, 476 U.S. 834, 842 (1986). Second, because "[t]he complaint" in a QTA proceeding must "set forth with particularity

the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstances under which it was acquired," 28 U.S.C. 2409a(d), the QTA makes relief available only to plaintiffs who themselves claim an interest in the land at issue. Both of those limitations apply here, and therefore, as Patchak recognizes (Br. 14-18), the QTA does not permit this suit.

Instead, Patchak insists that his suit may proceed under 5 U.S.C. 702, which was amended in 1976 to provide that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (5 U.S.C. 702). But the last sentence of Section 702 expressly provides that "[n]othing herein"—that is, nothing in the APA's waiver of sovereign immunity—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.* The QTA is such an "other statute," and for that reason, Patchak may not invoke the APA's waiver of sovereign immunity. See *Block*, 461 U.S. at 286 n.22 (QTA is an "other statute" that "expressly" forbids the relief if the suit is untimely under the QTA's 12-year limitations period).

A. The Quiet Title Act Provides The Exclusive Vehicle For Bringing Any Suit In Which A Plaintiff Challenges The Government's Title To Land

Like the court of appeals, Patchak emphasizes that, because he does not himself claim an interest in the Bradley Property, he cannot bring a suit under the QTA. And like the court of appeals, Patchak reasons (Br. 14-15) that the QTA "governs only traditional quiet-title actions, i.e., actions where the plaintiff claims some interest in the property at issue," and therefore (Br. 22) "the QTA's sovereign-immunity provisions simply do not apply to his APA claim." That reasoning is the basis for Patchak's entire argument, but it is not valid.

It is true that the QTA itself *permits relief* only in cases in which the plaintiff asserts a claim to the land at issue, but it does not follow that the QTA is irrelevant to the sovereign-immunity analysis in all other cases. Patchak simply assumes that the set of cases in which the QTA displaces the APA's waiver of sovereign immunity is limited to those in which the plaintiff claims an interest in the land. That assumption is inconsistent with the text of the APA, with background principles of sovereign immunity, and with this Court's precedents.

1. As an initial matter, Patchak appears to suggest that, simply because his "claim cannot be brought under the Quiet Title Act" (Br. 14), he must therefore be able to assert it by invoking the APA's waiver of sovereign immunity. The unstated premise of that reasoning is that the APA waiver is available in any case in which no other waiver of immunity applies. That interpretation of the APA is foreclosed by the text of Section 702, which plainly contemplates that a statute can be one that "grants consent to suit," thus triggering the exception to the APA's waiver, even if it "forbids the relief

which is sought"—that is, even in a case in which it does not allow the plaintiff to obtain relief. 5 U.S.C. 702; cf. *Brown* v. *GSA*, 425 U.S. 820, 834 (1976) (holding that "a precisely drawn, detailed statute pre-empts more general remedies," even when, on the facts of a particular case, the narrower statute provides no relief).

Patchak also advances a somewhat broader theory, suggesting (Br. 29) that the scope of a statute is determined by "the source of the right and the type of claim being brought." That theory, too, fails to take account of the text of Section 702. Congress's use of the word "any" in the phrase "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" reflects its intent to reach *all* statutes that expressly or impliedly preclude relief. 5 U.S.C. 702; see *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning."). And by referring to "the relief which is sought," Congress made clear that it is the relief sought in the complaint—not just the identity of the plaintiff who is seeking it—that determines whether the Section 702 waiver of immunity is available.

As relevant here, the QTA permits suits "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a); see Gov't Br. 20-22. The United States claims an interest in the Bradley Property in trust for the Band, and Patchak "dispute[s]" the United States' title to that land, arguing that the acquisition of trust title was not authorized by statute. The "adjudicat[ion]" of that "disputed title" is precisely the relief provided by the QTA. Because the limitations of the QTA prohibit that relief in the circumstances of this case, Patchak may not obtain the same relief under the APA. If the QTA bars relief to those

with a direct stake in the status of the property, it would make little sense to conclude that Congress intended to allow persons like Patchak to dispute the government's title on the basis of a far more attenuated interest.

2. Patchak's theory is also inconsistent with background principles of sovereign immunity underlying Section 702. First, as already explained, the general rule of sovereign immunity is that the United States may not be sued at all without its consent. See *Block*, 461 U.S. at 287. By the time of the 1976 amendments to the APA, there was a patchwork of exceptions to that rule, rendering the field of immunity "a mass of confusion." S. Rep. No. 996, 94th Cong., 2d Sess. 25 (1976) (*1976 Senate Report*) (letter to Sen. Edward M. Kennedy from then-Assistant Attorney General Antonin Scalia). In amending Section 702, Congress replaced that system with "a system directly and honestly based on relevant governmental factors." *Ibid.* Those "governmental factors" involve the effect of the litigation on the *government*, and that effect is determined by the relief that is sought, not by the identity of the plaintiff. Here, for example, the divestiture of the government's trust title to the Bradley Property would have no less of an effect on the government as trustee for the Band if issued at the behest of Patchak, a non-claimant, than if issued at the behest of someone claiming to own the property.

Second, because of the background rule of immunity, pre-APA statutes waiving immunity were enacted with the understanding that relief was unavailable except to the extent that it was permitted under the particular waiver statute. As Assistant Attorney General Scalia explained, Congress would therefore have had no occasion "expressly" to forbid relief other than that to which

it consented. *1976 Senate Report* 26-27. It is for that reason that the bill that became the 1976 amendment to Section 702 was amended to bar relief in cases where another statute "impliedly forbids the relief which is sought." 5 U.S.C. 702; see Gov't Br. 17-18. Patchak says little about the "impliedly" provision, and he does not address its history, but together they demonstrate that Congress intended to establish a broad rule that "in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *1976 Senate Report* 27. Patchak's limited conception of the extent to which the QTA precludes APA relief is inconsistent with that history.

Third, any doubt about the extent to which the QTA makes relief unavailable under the APA is resolved by the canon that "a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text" and that "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *Cooper*, 132 S. Ct. at 1448 (citation omitted). In this case, any ambiguity as to whether, for purposes of the APA's waiver of sovereign immunity, the QTA is an "other statute that grants consent to suit" but "expressly or impliedly forbids the relief which is sought" must therefore be resolved in favor of preclusion of relief under the APA.

3. As explained in the government's opening brief (at 13-15), even in the absence of the limitation in the last sentence of Section 702, general principles of statutory interpretation would compel the conclusion that a plaintiff may not rely on the APA to circumvent the specific limitations prescribed in the QTA. See *United States* v. *Fausto*, 484 U.S. 439 (1988). Patchak's response to that point is to repeat his contention (Br. 20) that he "is not bringing a suit within the QTA's scope";

but as the cases cited in the opening brief make clear, a precisely drawn statute can preclude relief for purposes of Section 702 even in cases where the narrower statute does not itself provide a remedy.

For example, it is well settled that because the Tucker Act, 28 U.S.C. 1491(a)(1), provides only for an award of money damages in a contract action against the United States, it precludes resort to the APA's waiver of immunity by a contractor seeking specific relief. *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986) (Scalia, J.). On Patchak's theory, however, a contract-based injunction against the government would be entirely permissible so long as it were sought by a non-party to the contract, who would not be "bringing a suit within the [Tucker Act's] scope." Br. 20. Section 702 offers no support for that surprising proposition.

Patchak relies (Br. 25, 29-31) on *Michigan* v. *United States Army Corps of Engineers*, 667 F.3d 765 (2011), cert. denied, 132 S. Ct. 1635 (2012), in which the Seventh Circuit held that, even though the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, does not authorize injunctive relief, a plaintiff seeking an injunction to abate a nuisance may invoke Section 702. The court in *Michigan* made an error paralleling that of Patchak, in that it failed to appreciate that the FTCA's comprehensive specification of the tort liability of the United States creates a "fair implication," 667 F.3d at 775, that other forms of liability are precluded. The court also found it significant that Michigan's nuisance action based on federal common law was not "cognizable" under the FTCA, which makes state law the source of substantive liability. *Id.* at 776. In fact, however, because the FTCA's waiver of sovereign immunity does not extend to claims based on federal law, the United States "simply has not ren-

dered itself liable" in cases where "federal law, not state law, provides the source of liability." *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994).

Patchak's approach is also in tension with this Court's interpretation of 5 U.S.C 701(a)(1), which provides that the APA's review provisions do not apply "to the extent that * * * statutes preclude judicial review." In *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984), the Court invoked that provision to restrict the class of plaintiffs who could challenge milk pricing orders, holding that consumers, who were not authorized to challenge such orders under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, could not rely on the APA to bring a challenge. In so holding, the Court rejected an argument paralleling that advanced by Patchak: that a party who has been expressly denied a right of review under one statute (in *Block*, milk consumers; here, a person not claiming an interest in land) may nevertheless invoke the general review provisions of the APA. See 467 U.S. at 349 ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.").

B. Permitting Patchak's Suit To Proceed Would Undermine The Purposes Of The Quiet Title Act

As explained in the government's opening brief (at 22-23, 25-27), the limitations on the scope of the QTA serve important purposes. Patchak's interpretation of the APA would permit the evasion of those limitations, and the frustration of those purposes, through artful pleading.

1. Congress deemed the Indian-lands exception to be "necessary to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands," because a "unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *Mottaz*, 476 U.S. at 843 n.6 (quoting H.R. Rep. No. 1559, 92d Cong., 2d Sess. 13 (1972) (*1972 House Report*)). Even the possibility of such suits would create uncertainty about the security of Indian trust title for at least the duration of the six-year APA statute of limitations, thus hindering the promotion of "tribal self-sufficiency and economic development." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)).

And even in cases not involving Indian lands, Congress sought to ensure that a QTA plaintiff would not be able to "force the United States from possession and thereby interfere with the operations of the Government." *1972 House Report* 6. To that end, the QTA provides that, if the plaintiff prevails, "the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation." 28 U.S.C. 2409a(b); see 28 U.S.C. 2409a(c) (prohibiting issuance of a preliminary injunction). That provision is closely tied to the requirement that the plaintiff be "the person [claiming] to be entitled" to the land. Patchak does not appear to dispute that the option of paying compensation rather than giving up title is unavailable when the plaintiff claims no

entitlement to the land. Thus, Patchak's reading would deny the government an option that Congress expressly sought to preserve.

2. Under Patchak's theory, anyone *except* a person claiming an adverse interest in the particular parcel of real property at issue is free to challenge the United States' title to trust lands by suing an officer of the United States under the APA. Patchak contends (Br. 35) that if such a suit were to succeed, ownership of the lands would simply revert to the Band. But in this case, the Band was not the previous owner of the Bradley Property. That owner voluntarily transferred title to the United States and is not a party to this case. If Patchak prevailed, the government would be obliged to give up its trust title to the Bradley Property, without the option of paying compensation to the former owner under Section 2409a(b).

More broadly, even outside the Indian-lands context, Patchak's position would subject the United States to numerous suits to adjudicate its title to real property even though no one in the suit has asserted a competing claim to the same property. Such suits could resemble the one rejected by the Seventh Circuit in *Shawnee Trail Conservancy* v. *United States Department of Agriculture*, 222 F.3d 383, 386-388 (2000), cert. denied, 531 U.S. 1074 (2001); see Gov't Br. 27-28, or one in which a claimant who lacks the right to sue under the QTA engages a cooperative third party to sue under the APA, see Gov't Br. 29. Patchak does not address that implication of his position.

3. Patchak attempts (Br. 34) to dismiss the serious practical difficulties resulting from his interpretation of the APA and the QTA as mere "policy considerations." But those difficulties illustrate the perversity of permit-

ting a party who claims no interest in the land to sue to bar the United States from holding title to land in trust for Indians, and to divest the United States of that title, even though the same suit would be barred if brought by a party who actually claimed an interest in the land. Section 702 was enacted just four years after the QTA, and there is no indication that Congress intended it to sweep away the QTA's carefully crafted limitations and to create such an illogical regime. To the contrary, the limitation set out in the last sentence of Section 702 makes clear that Congress intended just the opposite. See *Block*, 461 U.S. at 286 n.22.

C. The Presumption Of Reviewability Does Not Assist Patchak

Patchak points out (Br. 12) that there is a presumption in favor of judicial review of agency action, and he asserts (Br. 35) that application of sovereign-immunity principles in this case would mean that the Secretary "gets to unilaterally decide whether [his] land-in-trust decisions are subject to judicial review." That is incorrect. By regulation, the Secretary must give 30 days' notice before taking land into trust for a tribe. 25 C.F.R. 151.10. During that 30-day period, anyone who can establish standing has the ability to bring any challenge to the Secretary's decision, and the APA's waiver of sovereign immunity will permit the suit to go forward. In this case, for example, an organization opposed to the trust acquisition litigated the issue for more than three years, which resulted in a ruling on the merits from the court of appeals and a decision on a petition for a writ of certiorari from this Court. See *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), cert. denied, 555 U.S. 1137 (2009).

Patchak argues (Br. 35) that the Secretary could halt such litigation by "taking the land into trust at any time following the 30-day window," and he suggests (Br. 24) that the Secretary did so in this case "with the goal of avoiding judicial review" in his lawsuit. But the Secretary took title to the Bradley Property only after the conclusion of the litigation in *Michigan Gambling Opposition*—the only suit filed within the 30-day period. Patchak was well aware that that action was possible, and he could have attempted to prevent it by obtaining an injunction. In fact, Patchak twice asked the district court for an order barring the acquisition, but the district court denied relief, and Patchak did not appeal. C.A. App. 64; J.A. 6-7, 11. Had Patchak been able to establish a likelihood of success on the merits, he could have obtained an injunction and preserved his right to review.[1]

Finally, Patchak speculates (Br. 35) that the Secretary might ignore the regulation providing for notice, thereby taking land into trust while avoiding any possibility of judicial review. But there is no basis for presuming that the Secretary would act in bad faith and in

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[1] Emphasizing that he filed suit before the Secretary took the Bradley Property into trust, Patchak invokes (Br. 24 n.2) the so-called time-of-filing rule, which, in certain circumstances, assesses jurisdiction based upon the facts in existence at the time a plaintiff's complaint is filed, even if the facts have later changed. That rule is generally applicable only in diversity cases. See *ConnectU LLC* v. *Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008); 11-246 Cert.-Stage Reply Br. 8-10. In any event, the time-of-filing issue is outside the scope of the questions presented and was not considered by the court of appeals below, so there is no reason for this Court to consider it at this time. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach issues that "were not addressed by the Court of Appeals" because this Court is "a court of review, not of first view").

defiance of his own regulations. See *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001) (noting "that a presumption of regularity attaches to the actions of government agencies"). And the ability of a plaintiff to imagine a scenario in which an agency's action might evade review is not a basis for refusing to apply established principles of sovereign immunity, which inevitably operate, at least to some extent, to restrict review of government action.

II. PATCHAK LACKS PRUDENTIAL STANDING

The doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (quoting *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 397 (1987)). Here, that provision is Section 5 of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 985, which authorizes the Secretary to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. But Section 5 of the IRA has nothing to do with the interests asserted in Patchak's suit, which involve the effect of gaming—conducted under a different statute—on nearby landowners. Patchak therefore lacks standing to maintain this suit.

A. Patchak's Alleged Injuries Are Unrelated To The Interests Protected Or Regulated By Section 5 Of The Indian Reorganization Act

1. Patchak does not attempt to defend the court of appeals' theory that the allegation of a "cognizable" injury—a requirement of Article III standing—is suffi-

cient to establish prudential standing. Pet. App. 10a.[2] Instead, Patchak observes (Br. 37) that the test for standing "is not whether a plaintiff is a statutory beneficiary," and that the zone-of-interests test does not require an inquiry into whether "Congress specifically intended to benefit the plaintiff." *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). While it is true that Congress need not have set out to benefit the particular plaintiff, there must nevertheless be some relationship between the "interests to be protected or regulated" by the statute and the interests asserted in the suit. *Bennett* v. *Spear*, 520 U.S. 154, 175 (1997) (quoting *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)). Here, Section 5 of the IRA authorizes the Secretary "to acquire * * * any interest in lands * * * for the purpose of providing land for Indians," 25 U.S.C. 465, while Patchak asserts an interest in avoiding diminished property values, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land" near the site on which the Band has built a gaming facility. Pet. App. 10a. The relationship between that authorization and those interests is difficult to discern, and Patchak nowhere explains it.

2. According to Patchak (Br. 40), "the fact that Congress imposed a limitation on the [Secretary's] authority to take land into trust only for certain Indian tribes implies that Congress intended *someone* to be able to enforce that limitation." Even if that reasoning were valid, it would not help Patchak, because it is undisputed that there *is* someone who can enforce the statute—namely, state and local governments. See Gov't Br. 31-32. Be-

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[2] All references to "Pet. App." are to the appendix in No. 11-247.

cause state and local governments can lose some taxing and regulatory authority when land is taken into trust, they are arguably protected or regulated by the provisions of the IRA that authorize, and limit, the taking of land into trust. They therefore have prudential standing to challenge agency action that allegedly violates those provisions.

Patchak observes (Br. 40) that "[s]tate and local governments cannot necessarily be relied upon to enforce" Section 5 of the IRA, and he imagines (Br. 41) a situation in which such governments might choose to support an unauthorized land acquisition. To prevent that possibility, he concludes (*ibid.*), Congress must have "intended individual members of the community, and not just governmental entities, to be able to enforce" the statute. In reality, State and local governments have shown themselves to be willing and able to challenge the Secretary's land-into-trust decisions when they believe those decisions to be unlawful. For example, in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), on which Patchak relies, the plaintiffs were the State of Rhode Island and the Town of Charlestown, Rhode Island.[3] More to the point, it is always true that, if no one with standing chooses to sue, then agency action will not be reviewed. But that does not mean that Congress intended every member of the public to have standing. Cf. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (explaining, in the context of Article III standing, that

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[3] Although the merits of Patchak's claim under Section 5 of the IRA are not before the Court, his discussion of *Carcieri* appears to conflate the status of being "under Federal jurisdiction" in 1934, which is required for the Secretary to take title to land into trust for a tribe, 555 U.S. at 382, with the status of being "federally recognized" in 1934, which is not, see *id.* at 397-399 (Breyer, J., concurring). See, *e.g.*, Br. 2.

"[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing"). Nor does it follow that all those who "police a statute's limitations fall within that statute's zone of interests" (Patchak Br. 46), since every plaintiff who challenges an alleged violation of a statute can be said to be "polic[ing] a statute's limitations."

3. To support his claim of standing, Patchak relies heavily (Br. 42-44) on the Secretary's regulations. Those regulations prescribe procedures to follow, and factors to consider, when the Secretary decides whether to take land into trust for a Tribe; the factors include "[t]he purposes for which the land will be used," 25 C.F.R. 151.10(c), and "potential conflicts of land use," 25 C.F.R. 151.10(f); see 25 C.F.R. 151.11(a) (directing consideration of the criteria listed in Section 151.10 in evaluating requests for the acquisition of off-reservation lands). In Patchak's view (Br. 43), the regulations demonstrate "that land uses and the conflicts they may cause are within [Section 5 of the IRA's] zone of interests." That argument lacks merit.

Significantly, the opening paragraph of Section 151.10, which Patchak does not quote, provides that "[u]pon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired," and "[t]he notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. 151.10. Only then does the regulation state that "[t]he Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status."

Ibid. Accordingly, those criteria must be understood by reference to the entities to which the regulation provides for notice, and from which it contemplates receiving comments: state and local governments, not neighboring landowners. Even if the regulations were relevant to the prudential-standing inquiry, they would not support the view that the zone of interests embraces purely private concerns about use of the land, as opposed to governmental interests in taxation and land-use planning.

4. Finally, Patchak suggests (Br. 44) that the Court should look to other provisions of the IRA, beyond Section 5, in evaluating the zone of interests. That approach would be contrary to *Bennett*, in which the Court held that "[w]hether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." 520 U.S. at 175-176. Patchak cites several decisions (Br. 45) for the proposition that other provisions can define the scope of the zone of interests, but only two of them even involved standing, and they do not support his argument. In *Thompson* v. *North American Stainless, LP*, 131 S. Ct. 863 (2011), the Court stated that an employee alleging that he was fired in retaliation for his fiancée's discrimination complaint was "within the zone of interests sought to be protected by Title VII," *id.* at 870. But although the Court referred to "Title VII" in general, its evaluation of the zone of interests addressed only the anti-retaliation provision on which the plaintiff relied, and it did not cite any other provision as expanding the zone of interests. And in *FEC* v. *Akins*, 524 U.S. 11

(1998), after determining that the plaintiffs were within the zone of interests of the disclosure provisions of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, the Court noted that it had "found nothing in the Act that suggests Congress intended to exclude [the plaintiffs] from the benefits of these provisions, or otherwise to restrict standing," 524 U.S. at 20. In recognizing that other provisions of the statute might limit standing, the Court did not suggest that they could create it where it did not otherwise exist.

In any event, no other provision of the IRA protects or regulates any interest that is relevant to Patchak's suit. Patchak points (Br. 44) to 25 U.S.C. 463, which directs the Secretary to consider "the public interest" when deciding whether to restore certain surplus lands to Indian tribes. This case, of course, does not involve the restoration of surplus lands. More importantly, a requirement that an agency take account of "the public interest"—a common requirement in federal statutes, see, *e.g.*, 47 U.S.C. 309(a) (FCC licensing)—is not a kind of citizen-suit provision, conferring standing on any member of "the public" who objects to an agency's action. When Congress wishes to include a citizen-suit provision in a statute, it knows how to do so. See, *e.g.*, *Bennett*, 520 U.S. at 171.

B. The Interests Protected Or Regulated By The Indian Gaming Regulatory Act Are Not Relevant To Patchak's Standing To Sue Under The Indian Reorganization Act

The court of appeals believed that Patchak has standing to sue under the IRA because the interests underlying his suit are within the zone of interests protected by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* Pet. App. 8a. Relying on *Air Cou-*

rier Conference v. *American Postal Workers Union*, 498 U.S. 517 (1991), the court held that it is appropriate to examine IGRA's zone of interests because that statute is "linked to" the IRA. Pet. App. 8a. For the reasons explained in the government's opening brief (at 35-37), the court's analysis was flawed, and Patchak does not attempt to defend it, conceding (Br. 53) that "[t]his case is very different from *Air Courier*." Although Patchak nevertheless persists in arguing that the interests protected by IGRA are relevant to this case, his arguments lack merit.

Patchak observes (Br. 49) that "prudential standing is a matter of inferring congressional intent," and that "this Court routinely looks to related statutes when interpreting a particular statute." That may be true in some circumstances, but Patchak does not explain how any provision of IGRA (enacted in 1988) sheds light on what Congress intended when it enacted the IRA 54 years earlier. And even if IGRA were somehow relevant to interpreting the IRA, it would not follow that the interests regulated by the two statutes are the same.

Patchak relies (Br. 48-49) on *Clarke*, a prudential-standing case in which this Court considered the interests protected by two different statutory provisions that were enacted at different times. But the Court in *Clarke* examined the two provisions because one of them had created "a limited exception to the otherwise applicable requirement of" the other. 479 U.S. at 401. That type of relationship—an amendment of one statute by another—does not exist between the IRA and IGRA. Although Patchak states (Br. 53) that IGRA "is a specific limitation on the [Secretary's] authority to take land into trust under" 25 U.S.C. 465, just the opposite is true; the cited provision of IGRA provides explicitly that "[n]oth-

ing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. 2719(c). Nor is it true, as Patchak suggests (Br. 51), that "the IRA and the IGRA operate in tandem because unless land is taken into trust, such land ordinarily cannot be used for Class III gaming." For one thing, land can be acquired in trust in other ways, not just through the IRA. See, *e.g.*, Graton Rancheria Restoration Act, Pub. L. No. 106-568, Tit. XIV, 114 Stat. 2939 (25 U.S.C. 1300n *et seq.*); Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798. For another, gaming can be conducted on land that is not trust land at all, such as lands within an Indian reservation and restricted fee land. See 25 U.S.C. 2703(4).

In other words, for purposes of standing, the only relationship between IGRA and the IRA is that they both pertain to Indians and Indian tribes. But as this Court cautioned in *Air Courier Conference*, conducting the prudential-standing analysis at such a high "level of generality" would "deprive the zone-of-interests test of virtually all meaning." 498 U.S. at 529-530. Because Patchak has not attempted to sue under IGRA, the interests protected by that statute are not relevant to his standing.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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AMICUS CURIAE BRIEF

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BAND OF POTTAWATOMI INDIANS,

Petitioner,

v.

DAVID PATCHAK, ET AL.,

Respondents.

KEN L. SALAZAR,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

DAVID PATCHAK, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Congress of American Indians ("NCAI") and the Native American Finance Officers Association ("NAFOA") submit this brief as *amici curiae* in support of Petitioners.[1]

INTEREST OF THE *AMICI CURIAE*

As the oldest and largest national organization advancing American Indian interests, NCAI represents more than 250 tribes and Alaska native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. NCAI is dedicated to protecting the rights and improving the welfare of Indian tribes, their governments, and their members. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of issues affecting Indian country, including the federal trust-acquisition policies and procedures underlying this suit.

NAFOA is a national not-for-profit organization of tribal officers, controllers, treasurers, accountants, auditors, and financial advisors. It has served as a resource for tribal leaders and finance professionals

[1] In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* notified counsel of record for all parties of their intent to file this *amicus* brief, and all parties granted consent to file. Letters reflecting the parties' consent have been filed with the Clerk.

for over 30 years. NAFOA's mission is to foster development of financial and business expertise among tribal governments and their businesses by providing educational forums and resources and by instilling finance and accounting best practices. NAFOA focuses its efforts on building economic capacity, developing effective tribal economic policy, and forging relationships with the investment banking community in an effort to promote tribal economic growth. As such, NAFOA has a particularized interest in the financial issues and investment uncertainty in Indian country that have resulted from the lower court's decision.

Together, *amici* are uniquely positioned to more fully articulate to this Court the vital role trust lands play in tribal life and federal policy, and Congress's intent in establishing the "Indian lands exception" to the waiver of the federal government's sovereign immunity in the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. The trust status of Indian lands has created certainty and stability, fostering strong tribal governments and thriving tribal economies. *Amici* will demonstrate how the lower court's decision, if not reversed, will undermine the ability of tribal governments to effectively pursue political self-governance and economic self-sufficiency, in contravention of the longstanding federal policies embodied in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq*.

SUMMARY OF THE ARGUMENT

The ability of the United States to acquire and hold legal title to lands in trust for the benefit of Indian tribes is a core component of federal executive power, exercised pursuant to longstanding Congressional policy designed to promote tribal economic, cultural, and civic development. In 1934, Congress enacted the trust-acquisition provisions of the IRA to reverse prior policies of assimilation and allotment that had devastated tribal governments and decimated tribal land holdings. In enacting the IRA, Congress recognized that restoring and stabilizing tribal land bases is one of the most effective means to empower tribes to combat poverty and unemployment on Indian reservations. In the decades since 1934, Indian tribes have re-acquired only 10 percent of the more than 90 million acres of tribal lands lost between 1887 and 1934, but these additional lands held in trust by the United States have proven critical to realizing Congress's intent, providing numerous benefits both to tribes and to their neighboring communities.

When Congress enacted the QTA in 1972, it recognized that *post-hoc* challenges to the status of tribal lands would encroach upon the government's trust relationship with Indian tribes and would disrupt the trust-land policy that is so vital to tribal development. It purposely exempted tribal trust lands from the QTA's waiver of sovereign immunity to prevent such disruption.

The Department of the Interior designed the existing trust-acquisition process in light of that intent, carefully balancing the need for outside input with the crucial need for finality and certainty once the United States formally takes title to land. Under the existing system, state and local governments receive written notice of requested trust acquisitions, and the administrative process includes ample opportunity for public comment as well as administrative and judicial review of the agency's decision before the United States takes title. The system relies, however, on the established principle that once federal title to trust land is finalized, it is immune to collateral attack, thus preserving the certainty that is necessary to enable effective investment and land use.

The D.C. Circuit's decision, if not reversed, would destroy this carefully structured system and would bring about the very effects Congress sought to forestall by exempting Indian lands from the QTA's waiver of sovereign immunity. Under the D.C. Circuit's decision, a private party (who does not even assert a claim of title to the land in question) may bypass the administrative review process to challenge final, recorded trust-land acquisitions by the United States. Such challenges, which under the Administrative Procedure Act's ("APA") statute of limitations could be brought up to six years after a trust acquisition is finalized, would have disastrous effects. They would derail (or at best delay) development projects already begun on trust lands, thereby undermining

investments that tribes and non-Indian investors alike have made in reasonable reliance on the stability of federal title. More broadly, the mere possibility that such challenges could be brought creates systemic uncertainty over the trust status of tribal lands, which in turn drives away potential investors at a time when access to capital is already one of the primary impediments to economic development in Indian country.

The D.C. Circuit's decision frustrates long-standing and critically important federal policy promoting tribal self-governance and self-determination, and contravenes Congress's intent in exempting tribal lands from the QTA. This Court should accordingly reverse it.

ARGUMENT

I. Congress Intended the QTA's Indian Lands Exception to Protect the Stability of the Trust-Land System.

The QTA's waiver of the United States' sovereign immunity to permit suits challenging the federal government's title to land "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a).[2] As this

[2] Tribal trust land is "land held in trust by the United States for the benefit of a tribe or individual Indian." Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 15.03, at 968 (2005 ed.) [hereinafter "Cohen"]. Most tribal land in the United

(Continued on following page)

Court has recognized, Congress added this provision (sometimes called the "Indian lands exception") to the QTA because it was considered "necessary to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands," and because a "unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *United States v. Mottaz*, 476 U.S. 834, 843 n.6 (1986) (quoting H.R. Rep. No. 92-1559, at 13 (1972)). The legislative history of the QTA and the IRA elucidate why these considerations justified an exemption from the QTA's waiver of sovereign immunity.

The original drafts of the QTA did not include the Indian lands exception. After the original bill's introduction in Congress, several executive agencies that would be most affected by the proposed waiver of sovereign immunity objected to its provisions as "too broad and sweeping in scope." *See Dispute of Titles on*

States is trust land. *Id.* at 967. Statutory authority for most trust acquisitions rests on Section 5 of the IRA, 25 U.S.C. § 465, although other statutory bases, often specific to a particular tribe, exist as well. *See* Division of Real Estate Servs., Bureau of Indian Affairs, *Fee-to-Trust Handbook Version II*, at 3 (2011), *available at* http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf. Land located either within or contiguous to a tribe's existing reservation ("on-reservation") or outside the reservation's boundaries ("off-reservation") may be taken into trust, with corresponding federal regulations governing each type of acquisition. *See* 25 C.F.R. § 151.10 (on-reservation); *id.* § 151.11 (off-reservation).

Public Lands, Hearing Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs on S. 216, S. 579, and S. 721, 92d Cong. 21 (1971) (statement of Shiro Kashiwa, Assistant Attorney General, Land and Natural Res. Div., Dep't of Justice). The Department of Justice consequently drafted a new bill in consultation with the Office of the Solicitor General and other affected agencies. *See id.*

In urging passage of the Department of Justice bill, the Solicitor for the Department of the Interior explained the reasons for the Indian lands exception:

> [T]he Justice proposal specifically excludes lands held in trust for Indians and Indian restricted lands. The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R. Rep. No. 92-1559, at 13 (1972). Incorporated into the House report on the bill, this passage provides the paramount explanation of Congress's reasons for adopting the Indian lands exception – the federal government's trust relationship with the Indian tribes,

particularly as it pertains to tribal lands. *See Mottaz*, 476 U.S. at 843 n.6 (recognizing government's "'solemn obligations' . . . regarding Indian lands"). Congress has long understood that relationship, which carries with it "moral obligations of the highest responsibility," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), to impose upon the federal government an obligation to foster tribal self-sufficiency and economic development.[3]

One of the most important ways Congress has sought to fulfill that obligation is by authorizing the Secretary of the Interior, through the IRA, to acquire lands in trust for the benefit of Indian tribes. Congress recognized that stabilizing tribal land bases is crucial to tribal economic, cultural, and civic self-sufficiency. As explained by Representative Edgar Howard, the House sponsor of the IRA, the "essential and basic features" of the IRA were "[l]and reform

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[3] *See, e.g.*, Indian Self-Determination and Education Assistance Act § 3(b), 25 U.S.C. § 450a(b) ("Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy. . . ."); Indian Health Care Improvement Act § 2(a), 25 U.S.C. § 1601(a) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."); Tribal Law and Order Act of 2010 § 202(a), Pub. L. No. 111-211 (2010) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country.").

and in a measure home rule." 78 Cong. Rec. 11,729 (1934). Congress's programmatic strategy was not only to safeguard "security of the Indian lands," but to "develop[ ] as rapidly as possible Indian use of Indian lands for self-support." *Id.* at 11,730. The ultimate goal was "to make the Indians, as a group, self-supporting." *Id.* at 11,732; *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 73-1804, at 6 (1934)).[4]

It is this critically important and long-established statutory authority that Congress sought to protect in exempting "trust or restricted Indian lands" from attack under the QTA. 28 U.S.C. § 2409a(a). The Indian lands exception was not merely meant to protect federal title to trust lands. Rather, it was an integral part of a broader Congressional and executive strategy to revitalize tribes by protecting tribal lands, and it should be read in that context. In interpreting and applying the Indian lands exception, it is accordingly crucial for this Court to consider the broader trust-land system and the role trust lands continue to play

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[4] The regulations implementing the Secretary's trust-acquisition authority similarly recognize the critical role trust lands play in tribal development, providing that "land may be acquired for a tribe in trust status . . . (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination [or] economic development." 25 C.F.R. § 151.3.

in promoting tribal economic development and self-sufficiency.

II. The United States' Ability to Securely Hold Land in Trust is Central to Restoring and Protecting Tribal Homelands and Critical to Economic Development that Benefits Both Tribes and Surrounding Non-Indian Communities.

A. The Indian Lands Exception Furthers the Federal Policy of Fostering Tribal Self-Determination, Development, and Economic Prosperity.

The federal government's trust-acquisition authority continues to serve as "the primary means to help restore and protect homelands of the nation's federally recognized tribes," with the "vast majority of land-into-trust applications" intended for "purposes such as providing housing, health care and education for tribal members and for supporting agricultural, energy and non-gaming economic development."[5] By permitting collateral attack on federal title to tribal trust lands, the lower court's decision threatens to undermine this critical means of fostering tribal development.

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[5] News Release, U.S. Dep't of the Interior, Salazar Policy on Land-into-Trust Sees Restoration of Tribal Lands as Key to Interior Strategy for Empowering Indian Tribes (July 1, 2010), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc009902.pdf.

Trust land is crucial to tribal development for several reasons. First, and most obviously, "[h]aving a land base is essential for many tribal economic development activities," and trust acquisitions are the primary means to restore and stabilize tribal lands. U.S. Gov't Accountability Office, GAO-11-543T, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands* 3 (2011). Trust status – as opposed to mere ownership – is also important, however, because transferring land into trust places it under primary tribal and federal jurisdiction. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); Cohen § 15.07[1][a], at 1010.[6] This jurisdictional change exempts the land from state and local taxation, 25 U.S.C. § 465, and carries with it several other features that make trust land attractive to investors. For example, Congress and many tribes have established various tax incentives to spur development in Indian country. *See* Cohen §§ 8.02[3], at 689-90; 21.02[4], at 1288. In addition, tribes' authority to regulate use of trust lands, *see Montana v. United States*, 450 U.S. 544, 557 (1981); Cohen § 21.02[5][b],

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[6] Certain non-trust lands, for example tribal fee land within the boundaries of a reservation, may still qualify as "Indian country" and thus fall under primary federal and tribal jurisdiction. *See, e.g., Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27 & n.1 (1998). Trust status, however, remains the primary and most clear-cut way to "shield[ ] the land from involuntary loss, and . . . establish[ ] it as Indian country with all the jurisdictional consequences attaching to that status." Cohen § 15.07[1][a], at 1010.

at 1290, can enable them to attract investment by, for example, establishing land-use regulations or permit requirements that are more efficient than the state or local regulations that would apply were the land held in fee. In short, "[t]rust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development efforts." Julian Schreibman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol'y Rev. 353, 384 (1996); *see also* Cohen § 21.01, at 1280 ("There are many regulatory and tax advantages to doing business in Indian country.").

Trust land is crucial to tribal economic development not only because of these specific business advantages but also because of its structural attributes. Recent scholarship confirms that "as sovereignty rises, so do the chances of successful development." Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* 8, 15-16 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2003-02, 2003) [hereinafter Cornell & Kalt, *Reloading the Dice*]. This is so because economic development depends in large part on the presence of stable legal infrastructure and institutions, as well as vesting of decision-making authority in those most affected by economic decisions – tribes themselves. *See id.*; Stephen Cornell & Miriam Jorgensen, NCAI Policy Research Ctr., *The Nature and Components of Economic Development in Indian Country* 10-13 (2007) (stating that successful

economic development "begins with jurisdiction" and relies on subsequent development of "governance infrastructure"). By holding land in trust for a tribe, the United States reaffirms tribal sovereign authority over it, which promotes stable tribal governance and, crucially, "tightens the link between [economic] decision-making and its consequences." Cornell & Kalt, *Reloading the Dice*, *supra*, at 15. More often than not, the result is improved economic outcomes. *See id.*

In enacting the IRA, Congress recognized that restoring and stabilizing tribal land bases is the bedrock of any policy to promote tribal self-sufficiency. In the decades since, the facts have borne out the wisdom of this statutory strategy – the correlation between investment on tribal land and improved socioeconomic conditions is now well documented. Indeed, as tribes in the 1990s began to "invest[ ] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other infrastructure supporting tribal self-governance, tribes made "striking" socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, Harvard Project on Am. Indian Econ. Dev., *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix-xi (2005). These gains notwithstanding, however, tribes remain among the most economically distressed groups in the United States, with the U.S. Census Bureau reporting in 2008 a poverty rate of 27% among American Indians and Alaska Natives, compared with 15% among the population as a whole. GAO-11-543T, *supra*, at 1.

Further socioeconomic improvement in Indian country depends upon continued tribal economic development, in which trust land plays a vital role. The Department of the Interior has accordingly asserted a strong commitment to "fulfill[ing] [its] trust responsibilities," which it recognizes are critical in "empower[ing] tribal governments . . . to help build safer, stronger and more prosperous tribal communities."[7] The lower court's decision, if not reversed, will undermine these efforts by allowing *post-hoc* challenges to the trust status of tribal lands, which would destabilize tribal land bases and chill investment.

B. All Levels of Government and Neighboring Non-Indian Communities Benefit from Trust Lands.

Economic development in Indian country benefits not only tribes and their members, but surrounding local communities, state governments, and the federal government as well. Indeed, while the Department of

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[7] Press Release, U.S. Dep't of the Interior, Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference.cfm. Following the federal government's removal of more than 90 million acres of tribal land during the allotment period from 1887 to 1934 and the Termination Era of the 1950s and '60s, approximately nine million total acres of tribal land have been reacquired and taken into trust. News Release, Salazar Policy, *supra* note 5.

the Interior specifically solicits comments from state and local governments detailing their concerns about the impact a given trust acquisition may have on their tax bases and jurisdiction, *see* 25 C.F.R. §§ 151.10, 151.11, many trust acquisitions enjoy enthusiastic support from surrounding state and local governments, *see* GAO-11-543T, *supra*, at 4. This is not surprising, for several reasons.

First, tribal economic development directly infuses money into the broader non-Indian community in several ways. Tribal governments and reservation businesses separately account for billions of dollars in off-reservation spending. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 604 (2004).[8] Moreover, tribal-state revenue sharing agreements and other voluntary intergovernmental service agreements provide millions of dollars in additional revenue to state and local government coffers.[9] Second, continued improvements in tribes' socioeconomic conditions

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[8] In 1998, it was shown that tribal governments and reservation businesses accounted for $1.2 billion and $4.4 billion, respectively, in off-reservation spending. Graham, 80 N.D. L. Rev. at 604.

[9] *See, e.g.*, Arizona Dep't of Gaming, Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties as of February 2, 2012, *available at* http://www.gm.state.az.us/tcontributions_pdf/TC_Cummulative020212.pdf (reporting $90.5 million contributed in the 2011 fiscal year and $757 million since contributions began in 2004); *see also* Schreibman, 14 Yale L. & Pol'y Rev. at 380-81.

decrease social service costs for all levels of government. *See* Schreibman, 14 Yale L. & Pol'y Rev. at 380.[10]

The trust land at issue in this case provided just such concrete benefits to the governments, businesses, and communities surrounding the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' gaming development in Michigan.[11] The opening of the Band's gaming facility in 2011 directly created 900 new jobs and indirectly created an additional estimated 1,000 jobs – a tremendous boon in a severely economically depressed area. *See* Wayland Br. 8-9. Operation of the Band's casino is expected to generate some $30 million in annual spending directed primarily toward local vendors, as well as millions of dollars in increased revenue for surrounding local businesses. *See id.* Under a revenue-sharing plan with the State of Michigan and 10 public agencies, the Band already has begun contributing much-needed funds to local government. Its first distributions under the plan in June 2011 included $514,871 to local governments and more than $2 million to the State. *Id.* at 11. The

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[10] Congress recognized this very fact when it passed the IRA. As Congressman Howard explained, the federal government's success or failure in promoting tribal development, "[a]s it *raises or lowers the Indian in the social and economic scale*, and thereby tends to make him self-supporting or a public charge, . . . is of direct interest to the American taxpayer." 78 Cong. Rec. 11,726.

[11] *See generally* Brief of Wayland Township, et al., as *Amici Curiae* in Support of Petitioners [hereinafter "Wayland Br."], filed at the petition stage of this matter.

Band's operations can thus be expected to generate millions of dollars in crucial revenue for local governments and local businesses well into the future.

This is only one example of a successful and mutually beneficial development plan executed through the cooperation of a tribe and its neighbors. Tribes and communities all over the country are pursuing projects that yield not only economic benefits but provide governmental and other services to tribes and surrounding communities. Below, *amici* offer five examples that illustrate the range of productive uses to which tribes all over the country are putting trust lands today.

C. Five Case Studies in Successful Economic and Civic Uses of Lands Held in Trust for Indian Tribes Are Illustrative.

The size, scope, and type of developments occurring on trust land varies greatly, as reflected in a 2006 Government Accountability Office report that examined all non-gaming trust acquisitions granted in 2005.[12] U.S. Gov't Accountability Office,

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[12] The majority of the more than 560 federally recognized Indian tribes do not engage in any form of gaming business. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 Lewis & Clark L. Rev. 943, 945 (2008). Indeed, of the more than 1,900 trust land applications pending in 2010, over 95 percent were for non-gaming purposes. News Release, Salazar Policy, *supra* note 5.

GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications* 45-49 (2006). The proposed uses for these trust lands included, among other things, water treatment plants for constituent bands of the Minnesota Chippewa Tribe, tribal schools for the Muckleshoot Indian Tribe in Washington and the Saginaw Chippewa Indian Tribe in Michigan, agriculture for tribes in Wyoming, Kansas, and Montana, community recreation and potential commercial development for the Ho-Chunk Nation of Wisconsin, a fire station and EMT Community Service Center for the Sac & Fox Nation of Missouri in Kansas and Nebraska, and housing for various tribes in California, Connecticut, Minnesota, Wisconsin, Michigan, and Washington. *Id.*

The following case studies illustrate the variety of ways that trust lands help tribes further their economic, civic, and cultural goals:

1. The Chickasaw Nation. The experience of the Chickasaw Nation in Oklahoma, listed in the GAO report noted above, shows how trust acquisitions can be effectively used for an array of economic, governmental, and cultural purposes that empower the tribe's self-governance and benefit its members as well as the surrounding non-Indian community. Through cession of lands in the early 19th century – and ultimately forcible removal on the infamous Trail of Tears in 1837 – the Chickasaw were displaced from their ancestral homelands in and around what are now the states of Mississippi, Alabama, Tennessee,

and Kentucky.[13] *See* Barry Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples* 371-72 (2000). The Chickasaw settled in the Indian Territory (modern-day Oklahoma) and, by an 1837 treaty, were resettled in a district within the Choctaw nation. Treaty with the Choctaws and Chickasaws, art. I, Jan. 13, 1837, 11 Stat. 573. The Chickasaw Nation's governmental independence was restored in 1855, *see* Pritzker, *supra*, at 372; *see also* Treaty with the Choctaws and Chickasaws, art. 2, June 22, 1855, 11 Stat. 611, but its land base was radically fractured through allotment around the turn of the 20th century, *see* Cohen § 4.07[1][c], at 305, "a situation that severely hampered political and economic development well into the century." Pritzker, *supra*, at 372.

Despite these circumstances, the Chickasaw Nation today is recognized as a model of tribal economic development, with successful business endeavors that include information technology, medical and dental staffing, aviation and space technology, construction, manufacturing, banking, and property management, as well as gaming and tourism. *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 11 (Native Nations Inst. & Harvard Project on Am. Indian

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[13] The treaties by which this cession occurred include the Treaty with the Chickasaws, July 23, 1805, 7 Stat. 89; Treaty with the Chickasaws, Sept. 20, 1816, 7 Stat. 150; Treaty with the Chickasaws, Oct. 19, 1818, 7 Stat. 192; and Treaty with the Chickasaws, Oct. 20, 1832, 7 Stat. 381.

Econ. Dev., Joint Occasional Papers on Native Affairs Working Paper No. 1, 2010); *see also Diversifying Native Economies: Oversight Hearing Before the Comm. on Natural Res. of the U.S. House of Representatives*, 110th Cong. 109 (2007) [hereinafter *Diversifying Native Economies*] (statement of Neal McCaleb, Chairman of the Board of Directors, Chickasaw Nation Industries, Inc.). The Chickasaw Nation's strategic rebuilding of its land base through trust acquisitions underlies this remarkable renaissance. In 2005, for example, the Secretary took a number of parcels into trust for the Nation to put to a variety of uses: tribal government offices; a tribal community center; expansion of a chocolate factory owned by the Nation; operation of a convenience store, gas station, restaurant, video arcade, and associated parking space; and a sand and gravel processing plant. *See* GAO-06-781, *supra*, at 45-47. Such acquisitions have empowered the Nation both to build a diverse economic base and to make crucial investments in its government infrastructure and public services.

The Chickasaw Nation's development efforts have provided benefits well beyond the Nation itself. As of 2007, the Nation employed some 10,400 workers, both Indian and non-Indian, with an annual payroll of nearly $200 million, estimated to generate more than $7.5 million in state tax revenues. *See Diversifying Native Economies*, *supra*, at 110-11.

2. The Jamestown S'Klallam Tribe. The Jamestown S'Klallam Tribe, located on Washington's Olympic Peninsula, has also reinvigorated its economy

and improved its ability to effectively self-govern through strategic trust acquisitions. In the process it has conferred substantial benefits on the surrounding community.

The S'Klallam ceded their ancestral lands to the United States in 1855 in the Treaty of Point No Point. *See* Treaty with the S'Klallams art. I, Jan. 26, 1855, 12 Stat. 933. Many tribal members were reluctant to relocate to the reservation created under the treaty, however. The Jamestown S'Klallam community was formed when, in 1874, some of these members cooperated to purchase and settle on a 210-acre plot of land closer to their traditional fishing areas.[14] After passage of the IRA in 1934, the Tribe was given the choice to relocate or remain on its land and forgo federal recognition; it chose the latter.[15] In the 1970s, however, the Tribe concluded that the benefits of federal recognition were necessary to its continued economic development and self-sufficiency. It accordingly sought and obtained recognition in 1981.[16]

With federal recognition came the ability to place lands into federal trust. The Jamestown S'Klallam have made extremely effective use of that ability not only for economic projects, but also as a tool

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[14] *See Jamestown S'Klallam History*, Jamestown S'Klallam Tribe, http://www.jamestowntribe.org/history/hist_jst.htm (last visited Feb. 9, 2012).

[15] *See id.*

[16] *See id.*

for community development, with particular focus on infrastructure that has benefited both the Tribe and the surrounding community. For example, *amici* are informed that, when the local non-tribal fire department lost its lease, the Tribe placed tribal property into trust and built a fire station for the use of the local fire district. It charges the district below-market rent for the facility, which provides emergency services for all residents of East Clallam County. As a result, the cost of fire protection insurance in the area has decreased significantly. The Tribe has also constructed a 150,000-gallon reservoir on its trust lands (to be expanded to 350,000 gallons in 2012) with five associated fire hydrants that serve the neighboring community of Blyn, Washington.

3. The Confederated Tribes of the Warm Springs Reservation. Trust land acquisitions can also play a critical role in natural resource conservation, as illustrated by the Confederated Tribes of the Warm Springs Reservation of Oregon. For many years this Tribe has placed lands in federal trust in order to protect and enhance the off-reservation fishing, hunting, and traditional food-gathering rights reserved by the Tribe in an 1855 treaty. *See* Treaty with Indians in Middle Oregon, art. I, June 25, 1855, 12 Stat. 963. In the late 1970s, for example, the Tribe purchased from the Burlington Northern Railroad an 888-acre off-reservation treaty fishing site at Shears Falls on the Deschutes River, in order to prevent it from being bought for private development. The Tribe placed the land into trust in 1980, with a guarantee from the

Tribe of continued public access to the fishery, thus preserving the site for continued and uninterrupted use by both Treaty Indian and non-Indian fishermen alike.

Following this early success, trust acquisitions continue to play a vital role in the Tribe's efforts to preserve natural resources. *Amici* are advised that the Tribe recently succeeded in placing into trust another 197-acre fishing site along the Metolius River. The land's newly acquired trust status ensures that the Tribe can continue to manage the property to preserve and enhance its value as fish and wildlife habitat, and as an area where tribal members may exercise their treaty rights. The Tribe has a number of other off-reservation fee lands it acquired for the specific purpose of protecting and enhancing fish and wildlife resources, and hopes to transfer these parcels into trust in the future.

4. The Poarch Band of Creek Indians. The Poarch Band of Creek Indians provides another example of how critical the fee-to-trust process is to restoring tribal government and spurring community growth. The Poarch Creeks are descendents of a segment of the original Creek Nation, which once covered almost all of Alabama and Georgia and has a documented history going back to first European contact. Unlike many eastern Indian tribes, the Poarch Creeks were not removed from their tribal lands during the removal period in the 1830s and have lived together for almost 200 years in and around their reservation in Poarch, Alabama.

Like many tribes in the southern and eastern United States, the Poarch Band lost most of its land in the late 19th and early 20th centuries. When the Tribe was finally restored to federal recognition under the IRA in 1984, 49 Fed. Reg. 24,083 (June 11, 1984), it lacked a jurisdictional land base to provide for its members and to grow its economy. In 1985, however, the Bureau of Indian Affairs ("BIA") declared the Tribe's lands in and around Poarch to be a reservation under the IRA, thus restoring the Tribe's jurisdiction and ensuring its ability to self-govern. 50 Fed. Reg. 15,502 (Apr. 18, 1985).[17] The BIA has since taken additional adjacent lands into trust for the Tribe.

These restored trust lands are now the seat of the Poarch Band's government and central to its growing economy. The Tribe's tribal headquarters, health clinic, and police department are all located on reservation trust lands, and this governmental infrastructure benefits not only the Tribe but the surrounding community. For example, *amici* are advised that the Band has a cross-deputization agreement with Escambia County, and the Band's police officers provide assistance to the Escambia County Sheriff's Department, the Atmore Police Department, and the Alabama State Troopers. Tribal police officers also provide 24-hour police and dispatch coverage for a 17-mile radius from their headquarters. Without a trust land base,

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[17] *See generally History of the Poarch Band of Creek Indians*, Poarch Band of Creek Indians, http://www.poarchcreekindians.org/xhtml/culture.htm (last visited Feb. 9, 2012).

the Tribe could not provide these services to its members or the surrounding community.

The Tribe has enacted laws that govern its trust lands in a wide range of areas, including crime and domestic abuse, judicial procedure, historic preservation, environmental protection, building codes, housing, workers' compensation, water and sewage treatment, taxes, employment rights, and tort claims. These laws enable the Tribe to exercise its sovereignty on trust lands and develop resources that benefit the Tribe and the surrounding community, including a Boys and Girls Club, a Head Start program, several housing subdivisions, recreational facilities, a cultural center and museum, a gravel pit, and an industrial park.

5. Keweenaw Bay Indian Community. The Keweenaw Bay Indian Community, situated in Michigan's Upper Peninsula, provides a final example of effective use of tribal trust lands for cultural and economic development, and of a tribe's commitment and unique contribution to an entire region surrounding its reservation boundaries.

The United States entered into a treaty with the Community in 1854, promising to create a permanent homeland for tribal members on reservation lands. *See* Treaty with the Chippewa, art. 2, Sept. 30, 1854, 10 Stat. 1109. Despite this promise, from the late 1800s through 1939, over 20,000 acres of tribal reservation land were taken from the Tribe as a result of government misappropriation, tax sales, and other improper transactions. *See* Charles E. Cleland et al.,

Faith in Paper: The Ethnohistory and Litigation of Upper Great Lakes Indian Treaties 311-12 (2011). As a result, the Community has sought to restore its land holdings through a number of trust acquisitions. Among other uses, the Community operates a tribal government center, cultural center, police department headquarters, community college, and early childhood care center on its trust lands.

In addition, the Community operates two FCC-licensed radio stations on trust lands, which *amici* are informed serve approximately 80,000 listeners across eight counties in western Michigan's Upper Peninsula and in Wisconsin.[18] The Community's public affairs "Keep it in the UP" program, which it promotes through both its 50,000-watt station WCUP and its 100,000-watt station WGLI, seeks to develop customer loyalty to local tribal and non-tribal businesses as a means to drive economic growth and self-sufficiency not only on the Community's reservation but throughout the region.[19] The Community radio stations also devote airtime to local news and other public-affairs programming, making a significant

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[18] *See Eagle Country Coverage Map*, Eagle Country, http://www.keepitintheup.com/eagle-country.html (last visited Feb. 9, 2012); *The Rockin' Eagle Coverage Map*, The Rockin' Eagle, http://www.keepitintheup.com/rockin-eagle.html (last visited Feb. 9, 2012).

[19] *See* Keep It In The UP!, www.keepitintheup.com (last visited Feb. 9, 2012).

contribution to the cultural and civic infrastructure of the western Upper Peninsula.

As all of these examples illustrate, restoration and stabilization of tribal land bases through trust acquisitions play a very real and vital role in strengthening tribal governments and economies. Tribes across the country continue to use trust lands in myriad ways that benefit not only the tribes themselves but local communities and the nation as a whole. If not reversed, the lower court's decision threatens the viability of these beneficial development activities (to the extent they are situated on trust lands acquired within six years of a plaintiff's filing suit), as well as the development of future activities. By allowing *post-hoc* challenges to federal title, the lower court's decision undermines the very foundation of some of the most positive recent developments – and some of the most promising future opportunities – in Indian country.

III. The Existing Trust-Acquisition System Effectively Balances the Need for Input from Affected Communities and Governments with the Need for Finality and Certainty.

The Department of the Interior has carefully designed the trust-acquisition process to strike a balance between the need to take account of outside input and the need for finality once acquisition is complete. By placing time limits on the opportunity to comment and to challenge proposed trust acquisitions, the process is also designed to provide the

certainty with respect to title and trust status that is vital to productive use of any land.

The BIA's trust-acquisition process provides written notice to state and local governments, as well as the opportunity for public comment on proposed acquisitions, administrative review of any decision, and ultimately judicial review of the Secretary's final decision to place land into trust – but before the United States finally takes title.

When a tribe submits a request for a trust acquisition, the Secretary is required to "notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation." 25 C.F.R. § 151.10. These governmental entities are given 30 days to submit "comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." *Id.*

The BIA notifies the applicant tribe of any comments submitted and provides an opportunity for the tribe to respond. *See id.* It also "encourages tribes to . . . work with the local and state governments to arrive at . . . cooperative agreements" so that concerns may be resolved before the BIA reaches a decision. Larry E. Scrivner, Acting Director, Office of Trust Responsibilities, Bureau of Indian Affairs, *Acquiring Land Into Trust for Indian Tribes*, 37 New Eng. L. Rev. 603, 606 (2003). When the comment and review process is complete, the BIA publishes a Notice of Decision in the Federal Register or a local newspaper

and provides the opportunity for administrative review of the decision through the Interior Board of Indian Appeals. *See Fee-to-Trust Handbook*, *supra* note 2, at 14.

After administrative appeals, if any, are exhausted, there remains an opportunity for judicial review. When the agency reaches a final determination to take a parcel of land into trust, the BIA publishes notice in the Federal Register or in "a newspaper of general circulation serving the affected area." 25 C.F.R. § 151.12(b). The Secretary does not formally acquire title in the name of the United States until 30 days after publication of this notice. *Id.* The Department of the Interior specifically designed this 30-day window to provide the opportunity for "judicial review before transfer of title to the United States," because the Department has long held the view that "[t]he Quiet Title Act . . . precludes judicial review after the United States acquires title." 61 Fed. Reg. 18,082 (Apr. 24, 1996).[20]

The trust-acquisition process is thus carefully crafted to allow for outside input prior to the land being taken into trust. Indeed, the process involves no fewer than three formal notifications to state and local governments as well as the opportunity to challenge a

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[20] If a party does file suit within the 30-day notice period, the transfer of title is stayed. *See Fee-to-Trust Handbook*, *supra* note 2, at 15; *see also* 25 C.F.R. § 151.12(b).

trust application during the initial decision-making process, through administrative appeals, and through subsequent judicial review.

Moreover, the process works in practice, as illustrated by a recent trust acquisition under the IRA by the Eastern Regional Office of the Bureau of Indian Affairs. *Amici* are informed that this acquisition, referred to as the "Red River parcel," was made for the benefit of the Tunica-Biloxi Indian Tribe, located in Louisiana. The Tribe submitted its trust application in February 2005. The BIA notified the Governor of Louisiana and local governments of the request and solicited their comments, as contemplated by the regulations. The state and the local parish submitted comments. Notably, the Governor expressed concern that the land should not be used for gaming, and that the Tribe should continue to contribute levee protection funds after removal of the land from state jurisdiction.

As is often the case, the Tribe, parish, and state worked together to resolve these objections to the state's satisfaction during the administrative process. After nearly six years of careful review and negotiation, the United States took the Red River parcel into trust on October 27, 2011. No party pursued an administrative appeal and no one sought judicial review before the government took title.

The existing trust-acquisition process is thus carefully designed to account for the various competing interests at stake in any acquisition, and provides

ample opportunities for outside comment upon and review of the BIA's actions. In light of those opportunities, there is no justification to subvert Congress's intent to exempt Indian lands from attack once the United States takes title. The system as it stood before the D.C. Circuit's decision effectively balanced the need for outside input with the vital need for certainty and stability in title, which are necessary for effective investment in real property.

IV. The Decision Below Undermines the Trust-Land System the Indian Lands Exception was Meant to Protect.

When Congress adopted the QTA's Indian lands exception, it was conscious of the federal government's weighty trust obligations to Indian tribes and of the resulting decades-long federal policy related to tribal trust lands. In exempting tribal lands from the QTA's waiver of sovereign immunity, Congress sought not merely to protect federal title, but to protect this vital federal policy.

The Court of Appeals' decision undermines that purpose by clouding the United States' title to tribal trust lands, thereby sowing instability and uncertainty with respect to the jurisdictional and regulatory attributes of trust land that are crucial to its development. The decision creates an unassuageable fear that the United States could be divested of title to land already taken into trust and developed. This is precisely the kind of uncertainty the GAO has identified

as threatening to suffocate economic development and economic activity on trust land. *See* GAO-11-543T, *supra*, at 3-5. Regardless of whether any such challenges are ever brought, much less succeed, the mere *possibility* of such suits being filed is enough to scare away investors wary of committing capital to development projects in which some level of uncertainty already exists, both because of unique (and to some investors unfamiliar) aspects of doing business in Indian country and because of the uncertainty inherent in all capital investments.

Thus, the decision below, if affirmed, threatens to critically undermine investments already made, chill future investments on existing trust lands, and stymie proposed developments for the approximately 1,900 trust acquisition applications pending before the Department of the Interior and for all future trust applications to be filed.

A. Access to Capital is Critical to Tribal Development But Severely Diminished by Instability.

It is widely recognized that inadequate access to capital is among the most significant impediments to tribal development. *See* Community Dev. Fin. Institutions Fund, U.S. Dep't of the Treasury, *Report of the Native American Lending Study* 1-2 (2001) ("lack of access to capital" was the "one significant factor" identified as the reason behind economic problems in Native American communities); Cornell & Kalt,

Reloading the Dice, *supra*, at 6 (identifying the fact that "Tribes and individuals lack access to financial capital" as the first reason for "continuing reservation poverty"). The Director of the Office of Indian Energy and Economic Development succinctly summarized this problem in a statement to Congress: "Without capital, there is no enterprise, without enterprise, there are no private sector jobs." *Economic Development, Hearing Before the Senate Comm. on Indian Affairs*, 109th Cong. 108 (2006) (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Econ. Dev., Dep't of Interior). In fact, it has been reported that "[u]pwards of $50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development." Clarkson, 12 Lewis & Clark L. Rev. at 945.

It is similarly well recognized that uncertainty is one of the primary roadblocks to access to capital, and that legal and jurisdictional stability is critical to overcoming this barrier. "Investors' risks are raised, for example, by uncertainty in tax and/or regulatory policy, and by insecurity in the enforcement of contracts and agreements." Cornell & Kalt, *Reloading the Dice*, *supra*, at 24-25. "The central problem is to create an environment in which investors – whether tribal members or outsiders – feel secure, and therefore are willing to put energy, time, and capital into the tribal economy." *Id.* at 25; *see also Report of the Native American Lending Study*, *supra* at 4 (listing areas of "uncertainty" relating to legal infrastructure

and government operations as among the barriers to capital access).

Questions regarding land title and jurisdictional status create the very kind of uncertainty that diminishes the availability of capital. Indeed, the GAO recently raised this very concern – that "land in trust issues may create uncertainty" affecting economic activity on tribal land. GAO-11-543T, *supra*, at 3.

B. The D.C. Circuit's Decision Undermines the Stability the Existing Trust-Acquisition Process Provides.

As set forth above, the existing trust-acquisition process strikes a careful balance between the need for input from those affected and the need for finality and certainty. The D.C. Circuit's decision upsets that balance. If affirmed, it will cast an enduring shadow of uncertainty over the United States' title to all trust lands for six years after acquisition, creating the very kind of instability and uncertainty that drives investors away.

Challenges to trust acquisitions have heretofore been limited to the 30-day window between notice of an acquisition and actual transfer of title to the United States. *See supra* Part III. The lower court's decision now opens the possibility of a spate of challenges to trust acquisitions based on variegated legal theories, brought by a wide array of potential plaintiffs, and subject only to the APA's six-year statute of limitations. The decision is devastating to tribal

development efforts – and to surrounding non-Indian communities and businesses that cooperate in and depend upon them – for two reasons.

First, the lower court's decision would allow discontented parties to bypass the carefully structured administrative process and potentially to divest the United States of title to trust lands years after acquisition. In the meantime, tribes and non-tribal investors, businesses, and communities will often have pursued development projects at great effort and expense in reliance on federal title and the trust status of the land. Unforeseen *post-hoc* divestment of federal title will inevitably halt such projects, not only crippling tribal economic development efforts, but also undermining broader regional development plans and working a harsh forfeiture upon outside investors. Indeed, just such a result is threatened in this case. *See* Wayland Br., *supra* note 11, at 14-15. This Court has recognized in other contexts the significance of private parties' "distinct investment-backed expectations." *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). Such reasonable expectations, founded on the strength of federal title, merit protection here too.

Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956 (10th Cir. 2004) illustrates the potential for *post-hoc* challenges not only to frustrate private investment, but also to "seriously disrupt ongoing federal programs" situated on trust lands. *Mottaz*, 476 U.S. at 847. In 1993, the Secretary took the old Albuquerque Indian School grounds into trust

for nineteen Indian Pueblos, which sought to construct commercial office space and a hotel on the property through a lease to a federal Indian corporation chartered for that purpose. *See Neighbors for Rational Dev., Inc. v. Albuquerque Area Dir., Bureau of Indian Affairs*, 33 I.B.I.A. 36, 37-38 (1998). Neighbors for Rational Development challenged the lease on "a veritable laundry list" of National Environmental Policy Act grounds, ultimately losing at every step. *Id.* at 43. Only then, after years of administrative proceedings, did the group file a federal court action challenging the trust acquisition itself. *See Neighbors*, 379 F.3d at 959. Although the 10th Circuit correctly concluded that the QTA barred the challenge, *see id.* at 965, Neighbors had already inflicted significant costs on the development project, having delayed the commencement of construction until some ten years after the acquisition and five years after the exhaustion of administrative challenges.

Even more deleterious than this potential to undermine distinct investments in existing projects, however, is the systemic effect of the lower court's decision. If not reversed, the decision will cripple tribal development efforts because the mere possibility of a *post-hoc* collateral attack on the trust status of land – not the merits or actual success of any particular suit – breeds the uncertainty that is so noxious to investment. Investors will balk at the prospect of committing millions of dollars to finance a major development project if there exists some significant and long-enduring possibility that, after a parcel is

taken into trust, the United States' title to the land will suddenly be challenged in court. Thus, the lower court's decision not only threatens to destroy investments already made, but it has a chilling effect that likely will forestall desperately needed investment in the future.

This uncertainty is exacerbated by the fact that nothing in the D.C. Circuit's decision limits the grounds for potential challenges so long as, perversely, the plaintiffs do not assert the most readily cognizable interest – a claim to title in the land. Under the lower court's rationale, a plaintiff claiming that a trust acquisition is *ultra vires* or otherwise unlawful for any reason – statutory or otherwise – could proceed with his suit so long as the plaintiff himself did not claim title to the land.

Further compounding this problem is the D.C. Circuit's equally expansive and unprecedented holding on prudential standing, which would permit challenges to the United States' title under the IRA by any person alleging injury to rights protected by a different federal statute. Because the list of possible plaintiffs in such an APA action is now vast, tribes and developers will be unable to eliminate the possibility of such lawsuits by proactive negotiation and compromise.

For all these reasons, it is critical that this Court reverse the decision of the lower court so that tribal development on trust land, which provides so many benefits to tribes, their members, surrounding

communities, and the nation as a whole, may continue as *Congress intended.*

CONCLUSION

For the foregoing reasons, *amici curiae* NCAI and *NAFOA urge the Court to reverse the decision of the* United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, ET AL.,

Petitioners,

v.

DAVID PATCHAK, ET AL.,

Respondents.

KEN SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

DAVID PATCHAK, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF 28 CALIFORNIA COMMUNITY GROUPS AS AMICI CURIAE IN SUPPORT OF RESPONDENT PATCHAK

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are twenty-eight California community groups: Alexander Valley Association, Barstow Christian Ministerial Association, Big Lagoon Park Company, Blythe Boat Club, California Coalition Against Gambling Expansion, Citizens for a Better Way, Coalition of Retailers, Citizens for a Sustainable Point Molate, Colorado River Residents for Justice, Dehesa Valley Community Council, Friends of Amador County, Jamulians Against the Casino, Joshua Tree Community Association, Madera Community Action Network, Madera Ministerial Association, Neighbors of Casino San Pablo, No Casino in Cloverdale, No Casino in Plymouth, Old Barona Road Association, Rohnert Park Families, Santa Ynez Valley Alliance, Santa Ynez Valley Concerned Citizens, Save Our Communities, Stand Up For California, Stop Casino 101 Coalition, Stop Reservation Shopping, WE Watch, and West Bank Homeowners.

Amici have a strong interest in the Court's resolution of the questions presented. *Amici* oppose many fee-to-trust conversions of land in California. They also oppose the construction and operation of casinos in their hometowns because casinos degrade quality of life and have other negative impacts. Unfortunately, the fee-to-trust conversion process often

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[1] Pursuant to Rule 37, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

excludes residents and community groups from meaningfully participating in this critical stage in the development of Indian casinos. *Amici* want all affected parties to have a chance to participate constructively and fairly. *Amici* also believe that judicial review provides a vital check on fee-to-trust conversions and that private citizens and community groups are sometimes the only parties with the wherewithal to bring actions challenging fee-to-trust conversions.

INTRODUCTION

Throughout the history of federal policy toward Indians and their lands—whether or not it has been consistent, whether or not it can or should be criticized—Congress has consistently focused on the policy's local effects on Indians' relations with non-Indians. Despite that history and evident focus, the United States in this case denies that the local impacts of its decision to put land into trust for an Indian population are within the zone of interests of the federal Indian laws. The Court should reject that antithetical position.

Today, Indian gaming is at the center of Indians' relations with non-Indians. Across the country, 241 Indian tribes operate 462 casinos, high stakes bingo halls, and other gambling facilities on Indian lands. See National Indian Gaming Commission, *Gaming Tribe Report* (Feb. 9. 2012). With at least 62 tribes operating 70 gambling facilities throughout California, Indian casinos dot the state's landscape. *Ibid.* For tribes and private investors, however, that is not enough. Because tribes may operate gaming facilities only on "Indian lands" like trust lands, see 25 U.S.C. §§ 2703, 2710, 2719, tribes in California

push the Secretary of the Interior to undertake fee-to-trust conversions of lands they have purchased with casino profits and lands bought by non-Indian management companies angling to run new casinos.

Take the Soboba Band of Luiseno Indians. Since 1998, the Band has operated a huge casino on its 3,172-acre reserve—an 80,000 square foot gaming floor with blackjack, roulette, and poker tables and 2,020 slot machines. See Valley, JACKPOT TRIAL: INDIAN GAMING IN SOUTHERN CALIFORNIA 93-96 (2003); Soboba Casino website, http://www.soboba.com. With their gambling proceeds, the Band has purchased 534 additional acres outside the reserve, and in 2009, the Band asked the Secretary of the Interior to put that fee land into trust so the Band can build another casino, a 300-room hotel, and a convention center on the site. See *Draft Environmental Impact Statement for the Soboba Band of Luiseno Indians' Proposed 534-Acre Trust Acquisition and Casino Project, Riverside County, California*, 74 Fed. Reg. 31,747 (July 2, 2009).

Many of the consequences of fee-to-trust conversions are grim. Not all fee land put into trust for tribes is contiguous with other Indian land. The patchwork of converted land can take a variety of shapes, sometimes surrounding non-Indian fee land and creating, in effect, a jurisdictional island that can cause the land's owners great hardship. See, for example, the story of Lloyd Fields and his family property, told at http://www.morongolandgrab.com. And even if landowners are not cut off, a tribe's assertion of sovereign control over converted land always changes the character of a community, as one would expect to happen if an independent nation claimed part of an established town.

The inevitable construction and operation of casinos on trust land compound the troubles for residents of surrounding communities. Casinos—illegal to run on lands governed by state law—are inconsistent with local land use and zoning plans. They increase water use, exacerbating fire protection needs, interfering with wells, and blighting agriculture. They pollute and disrupt wildlife migration in sensitive environmental areas. They generate traffic and constant loud noise. They are associated with drunk driving and car accidents. And they unfairly compete with small and family-run local businesses.

Sometimes. state and local governments ally with private citizens and community groups against fee-to-trust conversions in California. See, *e.g.*, Barfield, *Criticism Fills Forum On Casino In Jamul*, U-T SAN DIEGO, Oct. 1, 2006 (noting that Governors Davis and Schwarzenegger opposed the fee-to-trust applications of the Jamul tribe in 2001 and 2004). Yet public and private interests do not always align. After all, Indian tribes are some of the biggest spenders on political campaigns in the state of California, and Indian casinos pay state coffers millions of dollars a year. See California Fair Political Practices Commission, *Big Money Talks*, at 4 (Mar. 2010); California Legislative Analyst's Office, *California Tribal Casinos: Questions and Answers* (Feb. 2007) (detailing tribal payments to state government), *available at* http://www.lao.ca.gov/2007/tribal_casinos/tribal_casinos_020207.aspx. Private citizens and community groups can be the only ones willing to stand up to authorities bent on converting more fee land into trust and developing more Indian casinos despite the problems they create. What's more, because so much of the decisionmaking process behind fee-to-trust conversions occurs out of the

public eye, private citizens and community groups need judicial review in order to have a meaningful opportunity to challenge fee-to-trust conversions.

SUMMARY OF ARGUMENT

In this case, the United States, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, and others contend that private citizens lack standing to seek judicial review of unlawful fee-to-trust conversions because private citizens' "interests are so marginally related to or inconsistent with the purposes implicit in" the federal laws governing fee-to-trust conversions and Indian gaming "that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke* v. *Securities Industry Assn.*, 479 U.S. 388, 399–400 (1987). That contention is wrong and twists the zone-of-interests test past the breaking point.

The zone-of-interests test is designed to prevent lawsuits by persons who "might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions." *Thompson* v. *North Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011). The injuries of private citizens who take the brunt of the impact of fee-to-trust conversions that unlawfully reshape and change their neighborhoods are not mere technicalities. The deep personal, property, and economic interests that give private citizens Article III standing are exactly the sort of interests protected by the relevant statutes. Under the Indian Reorganization Act, only some Indians—those under federal jurisdiction in 1934—are eligible to have fee land converted into trust land for their benefit. See 25 U.S.C. §§ 465, 479; see also *Carcieri* v. *Salazar*, 555 U.S. 379 (2009). Private citizens

have a protected interest in ensuring that fee-to-trust conversions not be expanded to benefit ineligible tribes who have long resided on fee land in established communities. In acknowledging the link between Indian gaming and the conversion of land and in protecting surrounding communities from the impact of both, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, buttresses that conclusion.

Recognizing that the zone-of-interests test cannot be applied to bar all possible challenges to agency action, the United States argues that state and local governments alone have standing to challenge fee-to-trust conversions. But there is no basis to distinguish between the private citizens who live near the land in question and the local governments with jurisdiction over the land: the economic and property interests of both stand to be diminished by the challenged conversion. Moreover, given the intense pressure to develop casinos, states and local governments simply cannot be counted on to object.

Holding that private citizens lack standing to challenge fee-to-trust conversions of local land could spill over into other areas of federal Indian law. Private citizens' prudential standing is an issue in other Indian cases. It has been challenged in cases questioning the approval of gaming ordinances, management contracts, and compacts; in cases challenging Indian lands determinations; and in cases involving other Indian contracts. See, *e.g.*, *Hollywood Mobile Estates Ltd.* v. *Seminole Tribe*, 641 F.3d 1259, 1268–1271 (CA11 2011) (holding that a non-Indian lessee lacked prudential standing to challenge the Secretary of the Interior's decision regarding its lease under the Indian Long-Term Leasing Act, 25 U.S.C. § 415).

Because Patchak, like private citizens and community groups generally, has vested interests protected by the laws governing fee-to-trust conversions, the Court should affirm the standing judgment of the court of appeals. The Court also should reject the United States' contention that the Quiet Title Act, in effect, defeats Patchak's standing. Private citizens have protected interests in whether neighboring land is held in fee or in trust, but those interests do not transform private citizens into "adverse claimants" whose suits under the Administrative Procedure Act are barred by the Quiet Title Act.

ARGUMENT

I. A PRIVATE CITIZEN HAS A RIGHT TO OBTAIN JUDICIAL REVIEW OF FEE-TO-TRUST CONVERSIONS IN HIS OR HER NEIGHBORHOOD.

As will almost certainly be true of private citizens and community groups complaining about fee-to-trust conversions in their backyards, the non-Indian neighbor in this case, Patchak, has constitutional standing to challenge the Secretary of the Interior's decision to convert fee land into trust land for a tribe that was not under federal jurisdiction in 1934. Judicial reversal of that decision will redress the serious economic, personal, and property harms that the conversion will cause Patchak. No party disputes this.

Because private citizens challenge fee-to-trust conversions as final agency action under the Administrative Procedure Act, 5 U.S.C. § 702, Patchak must have more than Article III standing to proceed. He also must have prudential standing, that is, he

must show that the interests he hopes to vindicate are "arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Trust*, 522 U.S. 479, 488 (1998) (quoting *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970)). The court of appeals correctly held that Patchak satisfies the zone-of-interests test. The interests of non-Indians who live near fee land slated to be converted into trust land are among the interests protected by the fee-to-trust provisions in the Reorganization Act and the integrally related Gaming Act.

In arguing to the contrary, the United States makes three fundamental errors. *First*, the United States wrongly contends that the only injuries in play flow from the post-conversion development and operation of a casino; in fact, regardless of whether a casino is ever built, private citizens have a protected interest in not having large swaths of their communities transformed (which is precisely what petitioners claim the power to do). *Second*, the United States wrongly contends that private citizens' casino-related interests are outside the scope of interests at stake in fee-to-trust conversions; but the fee-to-trust conversion decision is the foundation for the development and operation of Indian casinos. And *third*, the United States wrongly contends that state and local governments are differently situated than private citizens and community groups concerned about local fee-to-trust conversions; the differences between private citizens and local governments actually demonstrate that private citizens are ideal plaintiffs to dispute fee-to-trust conversions.

A. Private citizens' interests in fee-to-trust conversions are within the Indian Reorganization Act's zone of interests.

The zone-of-interests test is "not meant to be especially demanding." *Clarke*, 479 U.S. at 399. It turns on nothing more than the "evident" and "apparent" purposes of the statute at issue. *Id.* at 399 & n.14. Its single aim is to keep courts from litigating challenges to agency action brought by plaintiffs who are "merely incidental beneficiaries" of the relevant statutes. *Nat'l Credit Union*, 522 U.S. at 494 n.7. Thus, for example, courts will not hear a court reporter's challenge to an agency's failure to hold a hearing the reporter would have been hired to record. See *Lujan* v. *Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990).

Without much trouble, one can imagine a small army of plaintiffs whom the zone-of-interests test would properly keep from challenging fee-to-trust conversions. Federal employees and officials complaining about the extra work of administering new trust land. Private citizens from a faraway state. Those who are morally opposed to gambling but who are otherwise unaffected by it.

But private citizens who live close to the land at issue can have interests germane to the decision to convert fee land to trust land. If land is converted, they have to deal with the immediate consequences day in and day out. Conversion changes where people hunt and fish or where cattle graze. It diminishes the local tax base, which in turn reduces public services. Most importantly, communities of non-Indians and Indians who have long lived together are torn apart by the creation of a practically independent state out of a theretofore integrated whole.

The interests of neighboring property owners with settled expectations upset by an unlawful fee-to-trust conversion come within the Reorganization Act's zone of interests. While the Reorganization Act in general may have been designed to put an end to many pre-1934 Indian policies, see *Yakima County* v. *Confederated Tribes*, 502 U.S. 251, 254–255 (1992), Congress *limited* that policy reversal to tribes under federal jurisdiction in 1934, see *Carcieri*, 555 U.S. at 395–396 (holding that the fee-to-trust conversion provision, 25 U.S.C. § 465, is limited by 25 U.S.C. § 479). The evident purpose of that limitation is to limit the increase and expansion of Indian trust land. And the apparent beneficiaries of that limitation are the private citizens who own land near and reside among Indians who have long been ineligible for fee-to-trust conversions. Congress was concerned with how the increase in trust land changes how Indians and non-Indians relate and coexist with each other.

The United States largely writes off these interests—interests injured by the conversion of fee land *whether or not a casino is ever built there*. According to the United States' reading of the Reorganization Act's legislative history, Congress limited the Secretary of the Interior's authority to take land into trust for Indians simply to reduce the burden on the government, not "to benefit surrounding communities or individual non-Indians." U.S. Br. 31.

In so arguing, the United States falls into two common traps. First, it is the apparent or evident purpose of a law, not legislative history, that drives the inquiry into the law's zone of interests. See *Nat'l Credit Union*, 522 U.S. at 490 (discussing *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970)). Second, a

superficial reference in a statute (or even its legislative history) to one set of intended beneficiaries does not mean that no one else's interests are protected. See *id.* at 489 ("[W]e should not inquire whether there has been a congressional intent to benefit the would-be plaintiff."); see also *Clarke*, 479 U.S. at 398 ("[I]t was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business."); *id.* at 396 n.10 ("The Court [in *Arnold Tours*] found it of no moment that Congress never specifically focused on the interests of travel agents in enacting § 4 of the Bank Service Corporation Act."). The whole point of the zone-of-interests test is to identify plaintiffs whom Congress did *not* specifically intend to benefit but who nonetheless are rightfully aggrieved by a law's violation.

Along the same lines, noting that the Reorganization Act specifically provides that state and local governments lose power to tax converted lands, the United States argues that those governments alone have interests within the Act's zone of interests. See U.S. Br. 31. But, again, the mere mention of one group of possible plaintiffs in the text of a statute does not preclude other groups from suing to enforce the statute. In fact, the United States' concession that state and local governments have prudential standing dooms its challenge to private citizens' prudential standing, for their interests are of the same sort, as the court of appeals observed. See *Patchak* v. *Salazar*, 632 F.3d 702, 707 (CADC 2011). Private citizens, community groups, and state and local governments all are entities in close proximity to the land at issue; all have interests, economic and otherwise, immediately harmed by fee-to-trust con-

version. Holding that all of them have prudential standing here is no different than holding that hunters, campers, bird watchers, loggers, and local residents all have prudential standing to challenge a decision regarding land use in a national park they frequent, work in, or live near.

For purposes of the zone of interests of the Reorganization Act's fee-to-trust conversion provisions, then, there are no material differences between private citizens and community groups, on the one hand, and state and local governments, on the other. If anything, the interests of private citizens and community groups put them in a better position to dispute fee-to-trust conversions. This case illustrates the point. No state or local government challenged the conversion of the fee land of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, *despite the conversion's invalidity under Carcieri*. The economic allure of an Indian casino is too great for cash-strapped local governments to resist. But private citizens (like Patchak) and community groups (like MichGO, who also sued to stop the conversion, see *Michigan Gambling Opposition* v. *Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007)) experience the downsides of fee-to-trust conversions in more than their wallets and pocketbooks. Inasmuch as the zone-of-interests test is a means for identifying classes of plaintiffs whose interests ensure that they will reliably seek to hold the government to the limitations that federal laws impose, the United States' resistance to Patchak's prudential standing is off base.[2]

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[2] Even assuming that the interests of state and local governments are within the Reorganization Act's zone of interests but that those of private citizens are not, the Court has held

(footnote continued on next page)

B. The Indian Gaming Regulatory Act confirms that private citizens can challenge fee-to-trust conversions.

The Gaming Act reinforces the conclusion that local residents' interests are germane to fee-to-trust conversions. In provisions dealing with Indian casinos on lands converted to trust after October 17, 1988, the Gaming Act specifically identifies "the surrounding community" as among those whose interests are protected. 25 U.S.C. § 2719(b)(1)(A). Those provisions reveal Congress's acknowledgment that Indian gaming and fee-to-trust conversions are linked activities that have an impact on residents.

The United States erroneously contends that the Gaming Act is categorically irrelevant to the zone-of-interests question presented in this case. Quoting *National Wildlife Federation*, the United States asserts that "the zone-of-interests analysis is *limited* to the particular 'statutory provision whose violation forms the legal basis for his complaint,'" which here is the Reorganization Act, not the Gaming Act. U.S. Br. 32–33 (emphasis added) (quoting 497 U.S. at 883). Notwithstanding that formulation, the Court has not actually aimed the zone-of-interests test at only the precise statute a plaintiff claimed was violated. The Court, in fact, has stated that it is "not limited to considering the statute under which [plaintiffs] sued, but may consider any provision that helps us to understand Congress' overall purposes." *Clarke*, 479 U.S. at 401; see *id.* at 396–397 (noting

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that private citizens with constitutional standing have prudential standing to complain about the way federal action affects a state. See *Bond* v. *United States*, 131 S. Ct. 2355 (2011).

how *Data Processing* construed the "relevant statute" broadly by relying upon a statute different from that which the plaintiff had claimed was violated). A statute other than one whose violation forms the legal basis of a plaintiffs complaint may be relevant if it has an "integral relationship" with the primary statute. *Air Courier Conference* v. *Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 529–530 (1991).

The Gaming Act has an integral relationship with the Reorganization Act. The acts are not linked only insofar as both deal with Indians. Regulation of Indian gaming explicitly depends on the nature of the land where the gaming occurs and when that land was acquired. See 25 U.S.C. §§ 2710, 2719.

The United States overemphasizes the Gaming Act in its effort to discredit the court of appeals' correct holding that private citizens have prudential standing to challenge fee-to-trust conversions. Indians conducted gaming on their lands before the Gaming Act. The act was Congress's response to the Court's determination that states could not regulate gaming on Indian lands, which left such gaming effectively unregulated. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221–222 (1987). Gaming and Indian lands were integrally related before the Gaming Act, so it is completely understandable that residents' concerns about local gaming are interests relevant to the decision regarding fee-to-trust conversion.

* * * * *

In sum, the impact of Indian activities on local communities and non-Indian populations is one of the central concerns of federal statutes regulating Indian lands, if not the utmost concern. Precisely

because belated fee-to-trust conversions are so disruptive to integrated Indian/non-Indian communities, the Reorganization Act limits the Indians for whom the Secretary of the Interior can move land into trust to those that were under federal jurisdiction in 1934. Likewise, the Gaming Act expressly requires decisionmakers to consider the impacts on local communities in determining whether Indian gaming is allowed on lands recently converted from fee into trust. Local citizens and citizens groups are the most directly aggrieved parties when federal officials violate these statutes, and they have standing to vindicate their interests.

II. THE QUIET TITLE ACT DOES NOT BAR SUITS BROUGHT BY PRIVATE CITIZENS CHALLENGING FEE-TO-TRUST CONVERSIONS UNDER THE INDIAN REORGANIZATION ACT.

Patchak challenges the government's fee-to-trust conversion as statutorily unauthorized, claiming that "because the Gun Lake Band was not under federal jurisdiction in 1934, the Indian Reorganization Act * * * did not authorize the Secretary to take the Band's land into trust." *Patchak*, 632 F.3d at 704. Because he does not seek damages or title and because he claims that the Secretary of the Interior acted under color of legal authority, the United States has waived its sovereign immunity to Patchak's suit, under the Administrative Procedure Act. See 5 U.S.C. § 702.

Relief under the Administrative Procedure Act would be limited if Patchak's suit was governed by another statute granting the United States' "consent to suit expressly or impliedly forbid[ding] the relief

which is sought." 5 U.S.C. § 702. Although the United States argues that the Quiet Title Act limits Patchak's relief, the court of appeals correctly concluded that the Act is inapplicable here. The United States should not be permitted to evade suit by asserting the Quiet Title Act in cases, like this one, where a private citizen or community group challenges government action as unauthorized under 25 U.S.C. § 465 and does not seek to quiet title as to any parcel of land.[3]

The Quiet Title Act provides that "[t]he United States may be named as a party defendant in a civil action *under this section* to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands * * * ." 28 U.S.C. § 2409a (emphasis added). The United States notes that "[t]his Court has twice held that 'Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." U.S. Br. 18 (quoting *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) ((quoting *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983))). And indeed, this Court has so held. But the key point here is that Patchak—like other private citizens and community groups challenging fee-to-trust conversions—is not an "adverse

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[3] The United States has sought to evade suit by relying on the Quiet Title Act in cases where citizens do not challenge title to land, but challenge whether a state has ceded sovereignty over land to a tribe or the government, as required by the Constitution. See, *e.g.*, *Citizens Against Casino Gambling in Erie Co.* v. *Kempthorne*, 471 F. Supp. 2d 295, 320 (W.D.N.Y. 2007).

claimant" and so has not brought an action "under" the Quiet Title Act. *Mottaz*, 476 U.S. at 841; *Block*, 461 U.S. at 841; 28 U.S.C. § 2409a.

A "claimant" is someone "who asserts a right or demand * * * esp., one who asserts a property interest in land, chattels, or tangible things." BLACK'S LAW DICTIONARY (9th ed. 2009). *See* Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2426 n.45 (2001) ("An adverse claimant holds property under claim of title or claim of right when she has the intent to hold the land as an owner."). Patchak is certainly *adverse* to the Secretary's decision to convert fee land into trust land for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, but because he does not assert a property interest in that land, he is not an adverse *claimant*.

What holds for Patchak holds for private citizens and community groups. Unlike true adverse claimants, private citizens and community groups would not be necessary parties to "a suit to remove a cloud or quiet title" of the land at issue in a fee-to-trust conversion. *Appalachian Elec. Power Co.* v. *Smith*, 67 F.2d 451, 456 (CA4 1933) (citations omitted). That is because non-Indian neighbors do not seek "both possession and legal title" to converted land. *Frost* v. *Spitley*, 121 U.S. 552, 556 (1887) (citation omitted) (emphasis added). They seek only to reverse the Secretary's unlawful decision to convert the land from fee land into trust land.

For these reasons, the Quiet Title Act does not prevent a court from adjudicating a private citizen's challenge to a fee-to-trust conversion as unlawful under 25 U.S.C. § 465. The court of appeals correctly held that Patchak's suit under the Administrative Procedure Act may proceed.

CONCLUSION

The Court should affirm the judgment of the court of appeals that private citizens like Patchak (and, by extension, community groups like *amici*) can challenge fee-to-trust conversions.

Respectfully submitted,

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March 27, 2012

AMICUS CURIAE BRIEF

Nos. 11-246 & 11-247

IN THE
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WAYLAND TOWNSHIP, WAYLAND AREA CHAMBER OF COMMERCE AND OTHER LOCAL GOVERNMENTS AND BUSINESS ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are local government entities and business associations in southwest Michigan, a region that includes the 147-acre tract of land, known as the "Bradley Tract," at issue in this case.[1] The United States holds the Bradley Tract in trust for Petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Band"). The Band's economic development of the Bradley Tract provides substantial and much-needed economic benefits to *amici* and the local communities they serve.

Amici Wayland Township, Allegan County, Allegan Area Educational Service Agency, Wayland Union Schools, City of Wayland, Dorr Township, Martin Township, Hopkins Township, and Yankee Springs Township are local government entities in southwest Michigan that are engaged in cooperative efforts to foster economic development in an area that includes the Bradley Tract. Several of the *amici* local government entities have entered into a revenue sharing agreement with the Band pursuant to a compact between the Band and the State of Michigan that has been approved by the Secretary of the Interior on behalf of the United States. *Amicus*

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[1] Pursuant to this Court's Rule 37.6, the *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Deputy Sheriff's Association of Michigan is an association of sheriffs' deputies whose members benefit from economic development of the Bradley Tract, which has generated revenues that are being used to hire and retain law enforcement officers.

Amici Wayland Area Chamber of Commerce, Allegan Area Chamber of Commerce, Kalamazoo Regional Chamber of Commerce, Dorr Business Association, West Michigan Hispanic Chamber of Commerce, Barry County Chamber of Commerce, Barry County Economic Development Alliance, and Gun Lake Business Association are business associations whose members benefit from the Band's economic development of the trust lands. For the local business entities, as for the local government entities, uncertainty over the status of the Bradley Tract created by the threat of continuing litigation deters investment and makes reliable long-term planning impossible. The businesses represented by the *amici* associations would suffer a devastating loss of revenue and jobs if the federal government's decision to take the Bradley Tract into trust were reversed and, as a result, the revenues generated by the Tribe's economic development efforts were to cease.

Amici submit this brief to explain the nature and extent of the benefits that development of the Bradley Tract has conferred on the local community, the importance of those benefits to local governments and businesses, and the substantial harm that would be caused by a legal regime that leaves the status of trust lands open to challenge over a long period of time.

INTRODUCTION AND SUMMARY OF ARGUMENT

Michigan's economic troubles in recent years have been the subject of national headlines.[2] Faced with high unemployment and a decimated automotive industry, Michigan has been described as "ground zero in the national economic downturn."[3] Local governments and business associations in southwest Michigan have worked diligently to increase economic activity and job growth, but recovery has been slow.[4]

The development of the Bradley Tract has provided a much-needed boost to southwest Michigan's battered economy. In February 2011, the Band completed and opened a $165 million gaming facility, known as Gun Lake Casino, on the Tract. The facility generates critically-needed economic benefits for local communities and businesses.

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[2] *See, e.g.*, Bethany Biron, *Granholm to Talk Michigan Economy at State of the State Address*, Mich. Daily (Feb. 2, 2010), http://www.michigandaily.com/content/granholm-give-last-state-state; Susan Saulny & Monica Davey, *New Economic Fears Arise in Michigan*, N.Y. Times (Nov. 22, 2008), http://www.nytimes.com/2008/11/23/us/23michigan.html.

[3] Saulny & Davey, *supra* note 2.

[4] *On Labor Day, High Unemployment in Michigan, but Hope for Better Things*, Grand Rapids Press (Sept. 4, 2011), http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/09/on_labor_day_high_unemployment.html; Julia Bauer, *Unemployment Rises Again in West Michigan; Regional Labor Pool Also Shrinks*, Grand Rapids Press (Apr. 23, 2009), http://www.mlive.com/business/west-michigan/index.ssf/2009/04/unemployment_rises_again_in_we.html.

The opening of the gaming facility was preceded by a decade-long process. In 2001, the Band submitted a fee-to-trust application to the Secretary of the Interior requesting that the Bradley Tract be taken into trust under the Indian Reorganization Act for future use as a gaming facility. *See* 25 U.S.C. §§ 467, 2719. At the time, the Bradley Tract was the site of an abandoned manufacturing facility.

At the conclusion of an administrative review process, the Secretary issued a public notice ("Notice") that the Bradley Tract would be taken into trust for the Band. *See* 70 Fed. Reg. 25,596, 25,596-97 (May 13, 2005). As required by regulation, the Notice announced a 30-day waiting period before title to the land would pass to the United States. *Id.* at 25,596. The purpose of the waiting period is "to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." *Id.* The Notice clearly stated that the Bradley Tract would be "used for the purpose of construction and operation of a gaming facility." *Id.*

During the 30-day waiting period, an anti-gambling organization named Michigan Gambling Opposition ("MichGO") filed suit in the U.S. District Court for the District of Columbia challenging the Secretary's decision to take the Bradley Tract into trust. No other suit challenging the Secretary's decision was filed within the 30-day window set forth in the Notice. Both the district court and the court of appeals considered MichGO's claims and rejected

them. *Mich. Gambling Opposition (MichGo) v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *aff'd on other grounds by Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008). Following the court of appeals' decision, the Secretary took title to the Bradley Tract and placed the land into trust on January 30, 2009. The Band proceeded with its plans to develop the trust lands and opened the gaming facility on February 10, 2011.

The Band's economic development efforts on the trust lands have directly created 900 new jobs and infused area hotels, restaurants, and other businesses with much-needed customers and revenues. Additionally, the Band has entered into a revenue sharing agreement with regional governments that provides essential resources for schools, roads, sewer and water systems, public safety programs, and other critical needs. The Band's economic development efforts have facilitated intergovernmental service-sharing agreements that are critical to the region's recovery.

The court of appeals' decision in this case threatens to unravel these economic benefits and the progress they have fostered. The D.C. Circuit held that (i) Respondent Patchak has prudential standing to challenge the Secretary of the Interior's authority to place the land into trust, even though the suit was filed *years* after expiration of the 30-day window set forth in the Notice and (ii) the United States is not immune from Patchak's suit under the Quiet Title Act, 28 U.S.C. § 2409a. If successful, Patchak's suit would divest the United States of title to the trust lands. Absent special legislation, the gaming facility

on the Bradley Tract would be required to close its doors. The *possibility* of such a disastrous result, even after the United States has taken title to the Bradley Tract under the Indian Reorganization Act, creates substantial economic uncertainty and instability for local governments and businesses in southwest Michigan.

It is difficult for *amici* to engage in long-term planning, develop and approve budgets, and implement strategies for business growth and economic development when a significant source of projected revenue is at risk. For example, local government *amici* are pursuing new initiatives, including initiatives requiring significant expenditures that will likely be financed through municipal bonds and repaid over time, that require a dependable source of revenues from the trust lands. Likewise, businesses that depend on additional demand for their products and services as a result of the development of the trust lands face additional uncertainty in deciding whether to expand and hire additional workers.

If Respondent's suit is permissible, other trust lands across the United States will be susceptible to similar instability and uncertainty. Under the court of appeals decision, title to any trust lands could be attacked by any person who alleges that his or her quality of life was adversely impacted by events that flowed from U.S. ownership of particular trust land. This would inflict substantial economic uncertainty on businesses and governments across the country. As a result of this uncertainty and instability, jobs

may be lost and government services may be delayed, scaled-back, or eliminated altogether.

ARGUMENT

The Court of Appeals' Decision Threatens the Critical Economic Benefits That Flow From Development Of The Trust Lands.

I. The Band's Development of the Trust Lands Provides Substantial Benefits to Local Businesses and Governments.

The Band's development of the trust lands is providing significant and much-needed economic benefits to local governments, businesses, and community residents. These benefits include job creation, other economic benefits, and improved government services.

A. Development of the Trust Lands Has Created Hundreds of New Jobs.

The economic development of the Bradley Tract created 900 new jobs in 2011.[5] These new jobs are vitally needed. Allegan County, in which the trust lands are located, reported an 11.9 percent unemployment rate in 2010 (more than two percentage points higher than the national

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[5] Janice Allen, *Casino's Success Causing Gun Lake to Add 200 Jobs*, Fox 17 TV (Mar. 21, 2011), http://www.fox17online.com/news/fox17-new-casino-adding-jobs-casinos-success-causing-gun-lake-to-add-200-jobs-20110321,0,6883335.story (noting that Gun Lake Casino employs more than 900 workers).

unemployment rate).[6] In addition to these 900 jobs, approximately 750 skilled workers — including plumbers, electricians, carpenters, and sheet metal workers[7] — were employed during the construction of the $165 million facility.[8] Development of the trust lands has also indirectly created an estimated 1,000 outside vendor jobs.[9] The creation of new jobs has resulted in an expanded tax base for local governments and increased demand for goods and services provided by local businesses.[10]

B. Development of the Trust Lands Has Generated Other Significant Economic Benefits.

The Band estimates that, as a result of its development of the trust lands, it will spend approximately $30 million annually to purchase

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[6] *County-Level Unemployment and Median Household Income for Michigan*, USDA Economic Research Service (updated Dec. 2, 2011), http://www.ers.usda.gov/data/unemployment/, then "Michigan" hyperlink.

[7] *Gun Lake Casino Opening Weekend Draws a Full House*, Sw. Mich.'s Second Wave (Feb. 17, 2011), http://swmichigan.secondwavemedia.com/devnews/casino0217.aspx.

[8] Herb Woerpel, *Tribe Secures $165 Million Loan for Gun Lake Casino*, Penasee Globe (July 20, 2010), http://www.mlive.com/penaseeglobe/index.ssf/2010/07/tribe_secures_165_million_loan.html.

[9] *Gun Lake Casino Opening Weekend*, *supra* note 7.

[10] Ryan Lewis, *Wayland School, Township Win Big Checks*, Allegan Cnty. News (July 27, 2011), http://www.alleganews.com/articles/2011/07/28/local_news/2.txt.

vendor goods and services.[11] Most of those purchases will be made from businesses in southwest Michigan, providing a further substantial boost to the local economy.[12]

In addition, the Band estimates that the gaming facility will create 60,000 new guest stays per year at area hotels, generating an additional $4.4 million in revenues for hotel operators.[13] Other local businesses, such as restaurants, gas stations, drycleaners, and landscapers, can expect similar increases in demand for their services.

C. Development of the Trust Lands Has Increased Local Government Revenues.

In May 2007, the Band and the State of Michigan entered into a Revenue Sharing Agreement ("Agreement"), which was approved by the Secretary of the Interior. Under the Agreement, the Band pays a percentage of the revenues from the gaming facility to local government entities located in close proximity to the trust lands.

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[11] Pete Daly, *Gun Lake Casino to Break Ground Sept. 17*, Grand Rapids Bus. J. (Aug. 31, 2009), http://www.grbj.com/GRBJ/ArticleArchive/2009/August/August+31/BREAKING+NEWS.htm.

[12] *Gun Lake Casino Opening Weekend*, *supra* note 7.

[13] *Wayland Casino to Break Ground Sept. 17*, Wood TV 8 (Sept. 3, 2009), http://www.woodtv.com/dpp/news/local/gun_lake_region/Wayland_casino_to_break_ground_September_17.

Pursuant to the Agreement, the Band and ten public agencies (each of which has joined this brief as an *amicus curiae*) created a Local Revenue Sharing Board ("the Board"). The Board is an independent legal entity charged with establishing criteria and formulas for distributing a portion of the revenues from the gaming facility to the local governments.

Distributions are made every six months. The first distribution was paid out in June 2011, after the gaming facility had been in operation for just two months. Local governments received $514,871, and the State of Michigan received more than $2 million. Local governments use the revenues generated by the trust lands to fund a variety of government programs and initiatives.

For example, Wayland Township will use part its first distribution to hire two additional patrol deputies to provide public safety services.[14] Wayland Union School District used $194,628.31 from the first distribution to :

- cut preschool tuition rates by one-third;[15]

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[14] Herb Woerpel, *Gun Lake Casino Disburses $7.8 Million in Slot Profits Locally, Statewide*, Penasee Globe (Dec. 1, 2011) http://www.mlive.com/penaseeglobe/index.ssf/2011/12/gun_lake_casino_disburses_78_m.html.

[15] Julie Makarewicz, *Wayland Union School District Finds Uses for Gun Lake Casino Payment*, Grand Rapids Press (Aug. 23, 2011), http://www.mlive.com/wayland/2011/08/wayland_union_school_district.html.

- eliminate a $100 per sport fee that high school students previously were required to pay in order to participate in school athletics;[16]
- establish a public improvement fund, which was used to the paint the ceiling of the high school gymnasium;[17]
- develop a scholarship fund for graduating seniors to encourage families to stay in the Wayland area;[18] and
- fund maintenance and capital projects, thereby freeing up funds for academic services.[19]

Local governments have relied on the Agreement to plan critical infrastructure projects and other initiatives that would not have been possible absent the Band's continued development of the trust lands. Wayland Township, for example, is

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[16] Lisa LaPlante, *No More Pay-to-Play for Wayland Wildcats, Thanks to Casino*, Fox 17 News (Aug. 24, 2011), http://www.fox17online.com/news/fox17-wayland-schools-no-more-paytoplay-for-wayland-wildcats-thanks-to-casino-20110824,0,4518511.story; *see also* Makarewicz, *supra* note 15.

[17] Woerpel, *supra* note 14.

[18] Lindsey Smith, *Gun Lake Casino's First Payout to State, Local Governments Top Expectations*, Mich. Radio, (June 2, 2011),http://www.michiganradio.org/post/gun-lake-casino%E2%80%99s-first-payout-state-local-governments-top-expectations.

[19] Makarewicz, *supra* note 15.

planning to construct a new water and sewer treatment system that would replace the current septic system and provide significant environmental benefits.[20] Wayland Township used its first distribution under the Agreement to undertake a feasibility study in connection with the proposed water and sewer system and enter into an option contract to buy property upon which to locate the new sewer and water system.[21]

The second distribution under the Agreement was made in November 2011 and totaled $1.56 million for local governments and $6.24 million for the State of Michigan.[22] Local governments intend to use this distribution to fund public works and services projects. For example, Martin Township may use its share to purchase a new fire truck.[23] Allegan County will use its distribution to avoid cutting services to residents and to fund services for seniors, road maintenance projects, and the county's veteran relief fund.[24] Dorr Township hopes to invest

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[20] *Wayland Twp Board Talks Casino Plans*, Wood TV 8 (Feb. 2, 2009), http://www.woodtv.com/dpp/news/Wayland_Twp_board_talks_casino_plans.

[21] Lewis, *supra* note 10.

[22] Woerpel, *supra* note 14.

[23] Sheila McGrath, *Casino Payments Go to Local Governments Earlier Than Planned*, Advance Newspapers (Dec. 29, 2011), http://www.mlive.com/wayland/index.ssf/2011/12/casino_payments_go_to_local_go.html.

[24] Ryan Lewis, *Casino Revenue Boosts Budgets for Schools, Townships*, The Commercial Record (Jan. 4, 2012), http://www.allegannews.com/articles/2012/01/05/

(continued...)

in projects that will benefit the whole community, such as playgrounds and parks.[25] Wayland Township schools will make capital improvements, strengthen its scholarship program, and replace some high school lockers, among other things.[26]

The Agreement has facilitated the efforts of local communities to improve their public safety programs and engage in collaborative intergovernmental agreements. For example, Wayland Township is using a portion of the funds generated by the trust lands to fund a contract with the Allegan County Sheriff's Department under which Allegan County will provide two deputies dedicated to patrolling Wayland Township.[27] This cooperative venture strengthens intergovernmental cooperation in addition to improving public safety.

The Tribe's economic development of the trust lands has provided benefits to local communities in addition to those provided under the Agreement. For example, the Band and Gun Lake Casino donated $12,000 to the Allegan County Sheriff's Department for the purchase of a police dog that can be used for "search and rescue tactics, locating a lost child, and identifying illegal substances."[28] The donation

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local_news/1.txt.

[25] McGrath, *supra* note 23.

[26] Lewis, *supra* note 24.

[27] Lewis, *supra* note 10.

[28] Press Release, Gun Lake Casino, Gun Lake Tribe and Gun Lake Casino Donate Police K-9 to Allegan County Sheriff's (continued...)

reflects a newly-forged partnership between the Band and local law enforcement that promises to benefit all of the area's residents.

II. The Decision of the Court of Appeals Undermines the Benefits Derived From Economic Development of the Trust Lands.

The court of appeals' decision threatens to cause significant economic hardship for residents of southwest Michigan by undoing the benefits that have resulted from economic development of the trust lands. If the Court holds that Respondent is authorized to proceed with this litigation, the Bradley Tract could be taken out of trust, and as a result the gaming facility could be shut down. Nine-hundred casino workers would lose their jobs, as would many other workers who are employed by businesses that provide goods and services to the gaming facility and its patrons. The casino would cease to purchase $30 million in goods and services each year, and area hotels would lose 60,000 new guest stays per year. Many local businesses would suffer, and some would not survive. Local governments would face a significant loss of revenues and substantially decreased demands for services.

Even the *risk* that litigants such as Respondent may divest the United States of title to

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Department (Aug. 25, 2011), http://www.mbpi.org/PDF/News/Press%20Releases/PR_K-9_Donation_8-25-11.pdf.

the Bradley Tract creates a significant obstacle to realizing the full benefits of the Band's economic development efforts. In order for businesses to make long-term investments, they must be reasonably confident that the investment will be worthwhile. If businesses are uncertain about the trust status of the Bradley Tract, they may delay or scale back their investment plans, thus reducing the positive effects of the Band's development of the Bradley Tract. For example, a hotel operator may put off plans to build a new hotel, or to expand an existing hotel, if it concludes that the status of the trust land, and therefore the casino, is uncertain.

Similarly, local governments must be able to rely on the federal government's decision to take the Bradley Tract into trust in order to undertake infrastructure improvements and adopt other long-term programs. Local governments cannot engage in responsible planning and budgeting if they do not know whether Gun Lake Casino will continue to operate. Three examples illustrate the problem.

First, as noted above, Wayland Township is planning to construct a $17 million environmentally-friendly wastewater treatment facility. The facility would virtually eliminate the need for area homes to use septic systems and would, as a result, advance Michigan's policy (set forth in a statute) favoring sanitary sewer systems over septic systems. *See* Mich. Comp. Laws § 333.12752. The continued operation of Gun Lake Casino is central to Wayland Township's efforts to build this facility. The Township has a purchase option on the land on which the system would be built and is currently in

the process of extending that option; it will not exercise that option if the gaming facility closes. Although the revenue sharing distributions will not directly and fully fund the construction of the system, the expected revenue distributions could be used as collateral to secure the necessary financing.[29]

Second, and related to the example above, is the fact that to fund the new wastewater treatment plant, Wayland Township will need to issue revenue bonds or special assessment bonds. The Township cannot issue those bonds without knowing whether the Band — the largest prospective user of the improvements — will continue to operate the casino and pay the fees that will enable the Township to repay the principal and interest on the bonds. *See* Mich. Comp. Laws §§ 141.107, 41.735.

Third, there is space to expand Gun Lake Casino if demand allows.[30] Expansion would likely result in further economic benefits to area governments and businesses. But expansion can occur only if the trust status of the land is stable and local governments and businesses can rely on it as a basis for economic planning.

These examples illustrate in concrete terms the kind of adverse impact the court of appeals' decision in this case will have on the governments and citizens of southwest Michigan.

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[29] Lewis, *supra* note 24.

[30] *Gun Lake Casino Opening Weekend*, *supra* note 7.

The Court's decision in this case will also have an impact that extends far beyond southwest Michigan. Local governments and businesses across the country rely on the federal government's title to trust lands as the foundation for planning and investment in connection with economic development of trust lands. If individuals such as Respondent are free to challenge the validity of the title to the trust long after the lands have been placed into trust status, when a business is already operating on the trust lands, then communities across the country will face the same economic uncertainty and instability that now confront *amici*. As a result, no one will be able to place full reliance on U.S. title to trust lands as a way of promoting economic growth and providing vital public services.

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This Court has long held that a basic purpose of the law is to provide predictability. *See, e.g.*, *Regan v. New York*, 349 U.S. 58, 64 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs . . . ."). Nowhere is this consideration more significant than in the context of title to real property. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) ("[P]redictability and stability are of prime importance" in the context of "contractual or property rights.") (citation and internal quotation marks omitted). The court of appeals' decision undermines this predictability and places local governments and businesses in an unstable position: they have opportunities to invest in and improve their communities and grow their economies, but

they do not know whether those resources will be taken away. It is therefore imperative that this Court reverse the judgment of the court of appeals.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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